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# 80-1979

No. ——

IN THE

## Supreme Court of the United States

OCTOBER TERM 1980

JAMES TAMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## QUESTIONS PRESENTED*

1. Whether in a federal criminal trial a defendant who is charged in one count of an indictment with two separate offenses is entitled, upon request, to a unanimity instruction directed at that count in order to protect his right to a unanimous verdict under the Sixth Amendment.

2. The Travel Act (18 U.S.C. § 1952) makes it a federal criminal offense to use the facilities of interstate commerce to engage in "unlawful activity" under state law. The second question presented by this case is whether, in a Travel Act prosecution, the federal judiciary may, consistent with principles of federalism and this Court's interpretation of the Travel Act, define the predicate "unlawful activity" to include activity that the legislature of the state has chosen not to make criminal under state law.

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* In addition to petitioner, Charles Goldfarb, James Abraham, Edward Monazyn and the Aladdin Hotel Corporation were appellants in the court of appeals.

Petitioner hereby joins in the Petition for a Writ of Certiorari filed simultaneously with this Petition by codefendant Charles Goldfarb, which raises three issues that affect the judgment of the court below affirming petitioner's conviction.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*) is not yet reported. The opinion of the district court denying defendants' motions to dismiss (Pet. App. B, *infra*) is reported at 464 F. Supp. 565. The opinions of the district court entitled "Opinion Denying Motion to Dismiss No. 10" (Pet. App. C, *infra*), "Opinion: Multiplicity of Travel Act Counts" (Pet. App. D, *infra*) and "Opinion Denying Post-Trial Motions" (Pet. App. E, *infra*) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 1981 (Pet. App. F, *infra*). On April 1, 1981,

the court of appeals denied a timely petition for rehearing (Pet. App. G, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION, STATUTES AND STATE REGULATIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The pertinent portions of the Travel Act (18 U.S.C. § 1952); the federal conspiracy law (18 U.S.C. § 371); the Nevada statutes (Nev. Rev. Stat. §§ 463.150, 463.160(1)(a), 463.335 and 463.360); and Nevada Gaming Regulations §§ 3.100 and 3.110 are reprinted in Pet. App. H, *infra*.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendants Charles Goldfarb, James Abraham, Edward Monazyn and the Aladdin Hotel Corporation were convicted of conspiracy to violate 18 U.S.C. § 1952 (the Travel Act), in violation of 18 U.S.C. § 371. Goldfarb and Abraham were also convicted of violating the Travel Act. The jury acquitted petitioner of a similar charge. The court sentenced petitioner to three years' imprisonment and a $10,000 fine (App. 5).[1]

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[1] "App." refers to the Joint Appendix filed in the court of appeals.

The Travel Act prohibits the use of any facility of interstate commerce with intent to promote, manage, establish or carry on "any unlawful activity" (18 U.S.C. § 1952(a)(3)). "Unlawful activity" is defined as "any business enterprise involving gambling" in violation of state law (18 U.S.C. § 1952(b)). The revised Indictment [2] in this case described the "unlawful activity" as petitioner's and Goldfarb's "ownership, operation, conducting and carrying on of gaming operations" of the Aladdin Hotel and Casino in Las Vegas, Nevada, without obtaining a state license and by concealing their interest in the Aladdin, in violation of Nevada statutes and Nevada Gaming Commission Regulations (App. 43-46). These alleged State law violations were accomplished "through the use of interstate telephone lines between Detroit and Las Vegas" (Pet. App. 55a).

During the relevant period in 1976 and 1977, petitioner was a part-time employee of the Aladdin, serving as Director of Music and Entertainment. Petitioner held the required work permit under Nevada law and although the corporate licensee (the Aladdin) identified him to the Nevada Gaming Commission as a "key employee" under Gaming Commission Regulation 3.100, the Commission decided not to require the petitioner to submit to a determination of suitability under that regulation. App. 679, 687-692, 865-869. Defendant Goldfarb became a part owner of the Aladdin in 1971, but when the Aladdin applied to the Gaming Commis-

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[2] The district court ruled that the original Indictment was multiplicitous and the government then elected the counts on which the defendants were tried (Pet. App. 49a-54a).

sion for a license, the Commission denied licensing with respect to Goldfarb because of his "unsuitable" background and associations (App. 627-628). Goldfarb thereupon disposed of his Aladdin stock, retaining an option to repurchase, and reapplied to the Commission for approval as a stockholder of the Aladdin (App. 628, 704). At the time of trial, his application was still pending (App. 628-629). The Indictment also named as defendants James Abraham, the Aladdin's vice-president and general manager, and Edward Monazyn, a casino "host" employed by the Aladdin.

The government's evidence at trial consisted mainly of intercepted telephone conversations.[3] These conversations showed that defendant Goldfarb participated in the affairs of the Aladdin by arranging for the hotel to extend complimentary services (room, food and beverages) and gambling credit to a large number of persons (App. 497A, 697, 711) and by attempting to assist the Aladdin Corporation in its efforts to refinance the hotel to alleviate cash flow problems (*ibid.*).

With respect to petitioner, the government sought to show that he "was acting in capacities over and above that of Entertainment Director, as well as assisting Defendant Goldfarb in his continued surreptitious management of the Aladdin" (Brief for the U.S., at 13). The government introduced evidence of telephone conversations in which petitioner discussed the sale or

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[3] The government intercepted 14,000 of Goldfarb's calls during a 70-day period and 3,000 of petitioner's calls during a 30-day period (App. 714). At trial, the government introduced tape recordings of 96 of these calls.

refinancing of the hotel,[4] management of the casino and personnel matters. See, *e.g.*, App. 505A-506A.

In its post-trial opinion the district court summarized the government's case against all defendants: "Goldfarb was charged with unlicensed operation of the casino, while Tamer was charged with concealing his true role there from Nevada authorities. Abraham was both a co-conspirator and an accomplice to Goldfarb's crime. Monazyn was a co-conspirator" (Pet. App. 55a).

As to the "unlawful activity" under state law on which the Travel Act charges rested, the revised Indictment charged in separate counts that petitioner and Goldfarb had violated a state statute, Nevada Revised Statutes § 463.160.1(a), and Nevada Gaming Commission Regulations 3.100 and 3.110 (App. 43-45).[5] The statute, which is set forth at Pet. App. 80a, prohibited "any person, either as owner, lessee or employee" from operating or maintaining any game or slot machine in Nevada without first procuring and then maintaining any required state gaming license. Under Nevada law, a violation of this provision constitutes a gross misdemeanor. Nev. Rev. Stat. § 463.360(3).

One of the Gaming Commission Regulations cited in the revised Indictment—Reg. 3.100—required that the Aladdin submit an annual report identifying each in-

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[4] The government also introduced financial reports of the Aladdin recovered during a search of petitioner's business premises in suburban Detroit, Michigan.

[5] The substantive count naming Goldfarb cited, in addition, Nevada Revised Statutes § 463.335 and Regulation 8.060 (App. 43).

dividual involved in the supervision or administration of gaming operations (Pet. App. 81a). Another cited Regulation (Reg. 3.110) defined persons listed in the casino's annual report as "key employees" and authorized the Gaming Commission to decide whether the public interest required that such key employees should be licensed (Pet. App. 82a). The Nevada gaming statutes authorized the Gaming Commission to adopt regulations in the public interest (Nev. Rev. Stat. § 463.-150). However, there was no state statute making violation of a Commission regulation a criminal offense. As a result, the government conceded before trial in this case that a violation of the Gaming Commission's regulations could not constitute "unlawful activity" within the meaning of the Travel Act.*

The district court, however, refused to be bound by the government's pretrial concession regarding the regulations. In its charge to the jury, the court instructed (App. 1205-1206):

> Now, as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have force of law. It is that law which defines unlawful activity.

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* See Brief in Support of Government's Response in Opposition to Defendants' Joint Motion to Dismiss the Indictment For Failure to State an Offense, reprinted at App. 138 ("We do not quarrel with the defense position that violations of the regulations in and of themselves are not criminal acts within the purview of the Travel Act.").

Earlier in the case, the district court ruled that under the Travel Act, a federal court is not bound by state court interpretations of state law (Pet. App. 32a-35a). During the trial, the court stated that even though there may be no unlawful state activity from Nevada's perspective, a federal judge applying the Travel Act was free to interpret the state laws from a federal point of view and find the necessary "unlawful activity" under state law. See, *e.g.*, App. 945-959.

After giving the portion of the instructions quoted above, the court continued (App. 1206-1208):

> Now, against this general background, the following Nevada statutes are pertinent: Nevada Revised Statute 463.530 requires that all persons who require [sic] to become owners or shareholders in a gaming operation must have come before the Nevada gaming authorities for determination as to the suitability for license. The Nevada gaming authorities then make a decision whether to then issue a license to an applicant. If they deny the applicant a license, that person may not then thereafter exercise any ownership of, operation, conduct of the gaming affairs of the casino.
>
> Another Nevada statute, NSR 463.130, states that the violation of these Nevada gaming statutes is a crime, a gross misdemeanor. Thus, by concealment of his ownership or operation or conduct in the gaming conspiracy, a person may violate the Nevada laws.
>
> Keep in mind it is not the concealment itself which is the violation of the statute I have just discussed but rather the violation is the unlicensed ownership or operation of the gaming casino which is accomplished by concealment.
>
> I now take up another aspect of the Nevada laws on gambling. One of the regulations, [3.100], which

> is mandated by Nevada statute is required [sic], all holders of non-restricted licenses to disclose to the Nevada gaming authorities names of all persons exercising significant control and influence over gaming. Any changes in such activities must also be reported to the Nevada gaming authorities because of a strong state policy requiring disclosure of all persons who have significant control and influence as to gaming, and because of the statutory command that all gaming licenses which, whether held by a corporation such as the Aladdin Hotel or by individuals, must be maintained in conformity with all relevant provisions.
>
> I instruct you that it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities. The essence or gist of the violation I have just outlined is concealment, for which failure to disclose, this must be contrasted with the first instance of violation I described earlier, that violation having to do with an unlawful—or unlawful licensing violation of the Nevada casino, where the concealment is a means to achieve the violation but not itself the actual unlawful activity.

Petitioner objected to the foregoing instructions, which related to the conspiracy count of the Indictment, on the grounds that the court improperly determined that violation of a Nevada Gaming Commission regulation could serve as the necessary "unlawful activity" under the Travel Act and that the court had improperly instructed that concealment could constitute a violation of the Nevada gaming "laws". App. 377-381. (Although the court had instructed that concealment was itself "illegal" under Nevada law, see also Pet. App. 58a n.1, the government earlier in the

case had conceded that "concealment is not a crime" (App. 943).)

Petitioner also objected to the court's defining two possible conspiracies on which the jury could convict on Count 4 without at least giving petitioner's proposed instruction requiring the jury to be unanimous with respect to a particular conspiracy (App. 382-383). The two conspiracies defined in the court's charge were, as the court itself described them, (1) a "Goldfarb centered" conspiracy to operate the Aladdin through Goldfarb's unlicensed operation; and (2) a "Tamer centered" conspiracy to operate the Aladdin by concealing petitioner Tamer's role (Pet. App. 62a, 58a n.1). The court's failure to give the requested charge, petitioner argued, deprived him of his right to a unanimous verdict because, for example, six jurors could have found that only the first conspiracy had occurred while six could have found that only the second had transpired and yet the jury could return a verdict of guilty on the conspiracy count.

In post-trial proceedings, the government retreated from its concession at trial that a violation of the Nevada Gaming Commission regulations could not constitute "unlawful activity" within the meaning of the Travel Act. See p. 6 n.6 *supra*. After trial, the prosecutor took the position "that a violation of the Regulations alone would predicate a Travel Act violation."[1] The prosecutor explained that this is why the government had not objected to the court's instructions quoted

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[1] Government's Omnibus Response and Memorandum in Opposition to Defendant's Post Trial Motions And Exceptions to the Jury Charge, at p.10 n.1.

above, which defined "unlawful activity" in terms of the regulations alone.[8]

In its opinion denying defendants' post-trial motions, the trial court stated that if either one of its theories of "unlawful activity" was incorrect, the convictions on Count 4 (conspiracy) would have to be reversed because "it would be possible that the jury convicted on the basis of a conspiracy to do non-illegal acts" (Pet. App. 62a, n.3). As to the instructions regarding the "Tamer centered" conspiracy, with concealment in violation of Regulation 3.100 as the "unlawful activity" under the Travel Act (see Pet. App. 58a n.1), the court held that regulations were required under Nevada law, that the regulations had the force of law and that unless an individual could be prosecuted there "would be a gap in the effect of the statutory network" (Pet. App. 73a). The court also rejected petitioner's argument that the court's instructions on the conspiracy count deprived him of his right to a unanimous verdict. Distinguishing *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), the district court held that absent some evidence of impropriety, it must be presumed that a verdict is regular (Pet. App. 60a-62a).

The court of appeals affirmed in a confusing opinion. In regard to the jury instructions on "unlawful activity" within the meaning of the Travel Act, the court of appeals first characterized the district court's opinion as holding that commission or attempted commission of a state criminal offense is not an essential element

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[8] *Id.* The Government did not, however, withdraw its concession that a violation of the Gaming Commission Regulations did not constitute a crime under Nevada law. See p. 9 *supra*.

of a Travel Act violation (Pet. App. 6a). The appellate court later indicated that it agreed with the district court's interpretation of Nevada law (*id.* at 17a). Nevertheless, the court observed that a violation of a Gaming Commission regulation could not "in and of itself" form the predicate state law violation under the Travel Act (*id.* at 12a). The court then appeared to suggest that because the government had at one point disclaimed reliance on the regulations alone, the verdict could be sustained on the basis that the jury had not been instructed that non-criminal Nevada regulations defined unlawful activity under the Travel Act (Pet. App. 14a-15a).[9] (The jury, of course, had been so instructed and the government in its post-trial submission recognized as much, justifying its failure to object on the basis that it had changed its view about whether a non-criminal regulatory violation, without more, could serve as "unlawful activity" under the Travel Act, see p. 9 *supra;* Pet. App. 58a n.1).

Although petitioner had devoted a significant portion of his appellate brief to the argument that the court's instructions on the conspiracy count deprived him of his constitutional right to a unanimous verdict, the court of appeals never addressed the issue.[10]

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[9] Adding to the confusion, the court of appeals seemed to express disagreement with *United States* v. *Gordon*, 464 F.2d 357 (9th Cir. 1972), which held that violation of Nevada's nonpenal gaming regulations did not constitute "unlawful activity" under the Travel Act. Pet. App. 14a.

[10] The court disposed of a duplicity argument by codefendant Goldfarb regarding his conviction on Count 1 of a substantive violation of the Travel Act by stating merely that the jury had been instructed its verdict had to be unanimous. Pet. App. 18a.

## REASONS FOR GRANTING THE WRIT

### I.

The question whether petitioner was denied his right to a unanimous jury is raised not by a construction of the Indictment but by the trial court's charge to the jury. The court instructed that the jury could convict on the conspiracy count if it found either an agreement to operate the Aladdin in violation of state law through concealment of petitioner's role or an agreement to operate the Aladdin illegally under state law because of Goldfarb's lack of a license.[11] In light of the instructions setting forth two different conspiracies under a single count—one Tamer centered and one Goldfarb centered (Pet. App. 62a)—petitioner requested[12] an

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[11] In its opinion after trial, the district court held that it had instructed the jury on two conspiracies. The court stated that the jury was "told that either a Tamer-centered or a Goldfarb-centered agreement could be found, or both. . . ." (Pet. App. 62a). The court of appeals did not dispute the district court's view of the jury instructions.

This case is therefore not within the rule of *Braverman* v. *United States*, 317 U.S. 49, 53 (1942), that "the one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." See *United States* v. *Wilkinson*, 601 F.2d 791 (5th Cir. 1979). Here, the case went to the jury after a charge defining *two* agreements that could serve as the basis for a conviction on a single conspiracy count. Each alleged agreement constituted a separate offense. As the Court held in *Braverman* (*id.* at 53), "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects."

[12] Before the close of the case, the court had indicated that it would charge two conspiracies. The court denied petitioner's motion for judgment of acquittal, stating (App. 1161-1162):

> As to the defendant Tamer, there is evidence that the defendant Tamer was involved in conduct, arranging—for ex-

instruction that the jury must be unanimous about the particular agreement forming the basis for the conspiracy.[13]

The trial court's refusal to give a unanimity instruction directed to the conspiracy count, we submit, violated the petitioner's constitutional right to a unanimous verdict [14] and presents a question of recurring importance in the administration of federal criminal law. The issue, as Judge Feinberg recently stated for the court in *United States* v. *Murray*, 618 F.2d 892, 897 (2d Cir. 1980), poses "difficulties" for the federal courts and should *"be authoritatively resolved at a higher level before too long."* [15]

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tension of credit, for arranging for financing of the casino and in conduct involving personnel decisions. Thus, it could be found that he conspired with his co-defendants in concealing his real role and his involvement with the casino, as well as a conspiracy in which he joined to conceal the defendant Goldfarb's real role in the Aladdin.

[13] Petitioner's proposed instruction is set forth at App. 325. Petitioner filed formal exceptions contesting the court's failure to give his proposed charge or any other instruction protecting petitioner's right to a unanimous verdict (App. 382-383).

[14] Rule 8(a) of the Federal Rules of Criminal Procedure requires that separate offenses be stated in separate counts of an indictment. We do not claim, however, that this rule of pleading was violated. The indictment itself appeared to charge a single conspiracy and the government represented at trial that Count 4 alleged only one conspiracy "against both [petitioner and Goldfarb] to own, manage and operate" (App. 1170). It was the district court, without the concurrence of the prosecution or the defense, that devised instructions encompassing two separate conspiracies. See note 11 *supra*.

[15] Emphasis added. The question in *Murray* was whether a single count charging a conspiracy to import and a conspiracy to distribute marijuana and cocaine (21 U.S.C. §§ 846, 963) deprived the defendants of their right to a unanimous verdict. 618 F.2d at 896.

The difficulties mentioned in *Murray* do not stem from any dispute about whether unanimous verdicts are required. This Court has for many years adhered to the view that in federal criminal cases the accused's Sixth Amendment right to trial by jury entails a right to a unaminous verdict.[16] However, as Judge Wisdom stated in *United States* v. *Gipson*, 553 F.2d 453, 456 (5th Cir. 1977), "the scope of that right, unfortunately, is not" clear.

In *Gipson* two offenses were charged in a single count [17] and the court's instructions allowed the jurors to convict even if they did not agree about which of

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The court observed that there was a conflict in the circuits regarding whether these conspiracies, when charged in separate counts, could serve as a basis for multiple punishment. This conflict, the court stated, highlighted the difficulty and importance of the question actually presented in *Murray* (and in this case). *Id.* at 897.

After the decision in *Murray*, this Court decided *Albernaz* v. *United States*, —— U.S. —— (1981) (101 S.Ct. 1137), which held that consecutive sentences could be imposed for a conspiracy to import and a conspiracy to distribute marijuana. In light of *Albernaz*, there can be no doubt that *Murray* stands for the proposition that two separate conspiracies may be charged in a single count without violating the Sixth Amendment. *Murray* differs from the instant case because the defendants there failed to make a timely objection. See 618 F.2d at 899 n.8.

[16] See *Andres* v. *United States*, 333 U.S. 740, 748-749 (1948); *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); and Justice Powell's concurring opinion in *Johnson and Apodaca*, 406 U.S. at 369-371; compare *Burch* v. *Louisiana*, 439 U.S. 925 (1979) (state criminal trials). See also Rule 31(a), Fed. R. Crim. Pro.

[17] The instant case, like *Gipson*, does not involve a single count charging one offense committed by multiple means. Compare *United States* v. *Murray*, *supra*, 618 F.2d at 896; and see note 11 *supra*.

the two offenses the defendant had committed, so long as each juror thought that the defendant had committed one or the other offense. The court reversed Gipson's conviction because "under the instruction, the jury was permitted to convict Gipson even though there may have been significant disagreement among the jurors as to what he did." 553 F.2d at 458-459.[18]

Discussing the "policy underlying the unanimous jury right," Judge Wisdom reasoned that the unanimity rule, like the reasonable doubt standard, forces the jury to focus on the need for reaching a degree of certainty about the facts and for deciding what the defendant actually did before determining whether he is guilty. 553 F.2d at 457-458. When, as in this case, a single count encompasses two possible conspiracies, the jury must be instructed to focus on the agreement "which embraces and defines [the conspiracy's] objects." *Braverman* v. *United States, supra,* 317 U.S. at 53. Unless the jury is so instructed, the defendant's right to a unanimous verdict is not secure.

A general unanimity instruction, such as that given in this case near the end of the court's lengthy charge, cannot substitute for the specific charge petitioner requested with respect to the conspiracy count. The court told the jury (App. 1232-1233):

> Your verdict must represent the unanimous considered judgment of each juror. In order to return your verdict, each of you must agree thereto, if you can. Your verdict must be unanimous . .

Under this general charge, the jurors could reasonably have thought that so long as they were unanimous that

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[18] See generally Comment, *United States* v. *Gipson:* Duplicity Denies Right to Unanimous Verdict, 1978 Det.C.L. Rev. 319.

petitioner entered into a conspiracy, their guilty verdict on Count 4 complied with the court's instructions even though they disagreed on which of the two conspiracies set forth in the court's instructions was proven. As Judge Wisdom stated for the court in *Gipson, supra,* 553 F.2d at 458, "Requiring the vote of twelve jurors to convict a defendant"—which is all the general unanimity charge did in this case—"does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required."

In order to implement constitutional rights, the Court in recent years has required trial judges, upon request, to instruct that a defendant's failure to testify cannot be used against him (*Carter* v. *Kentucky,* —— U.S. —— (1981) (101 S.Ct. 1112)); that a defendant is presumed innocent (*Taylor* v. *Kentucky,* 436 U.S. 478 (1978); and that an indictment lacks evidentiary significance (*ibid.*). "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law" (*Carter* v. *Kentucky, supra,* 101 S.Ct. at 1120).

There is no sound reason why a federal defendant's Sixth Amendment right to a unanimous verdict should stand on any different footing. When a defendant in a federal criminal case faces a single count of an indictment that encompasses two or more offenses, the defendant should at least be entitled to a specific unanimity charge with respect to that count. This Court's reasoning with respect to the Fifth Amendment privilege applies as well to a defendant's Sixth Amendment right: "A trial judge has a powerful tool at his disposal to protect the constitutional [right to a unanimous verdict]—the jury instruction—and he has an affirmative

constitutional obligation to use that tool where a defendant seeks its employment." *Carter* v. *Kentucky, supra,* 101 S.Ct. at 1120.

The Seventh Circuit appears to agree. Although sustaining the conviction of a defendant who had not requested a specific charge aimed at a count charging two offenses, the court in *United States* v. *Pavloski,* 574 F.2d 933, 936 (7th Cir. 1978), indicated that it would reach a different result when a defendant has tendered "an appropriate instruction to the effect that the jurors must agree on at least one act. . . ." [19] In the instant case, petitioner tendered such an instruction and neither the district court nor the court of appeals offered any reason why it should not have been given in order to protect petitioner's Sixth Amendment right to a unanimous verdict.

*United States* v. *Murray, supra,* and the cases there cited, 618 F.2d at 898-899, sustained convictions on counts charging two or more offenses on the basis that it could be "assumed" the jury acted unanimously. But a defendant's Sixth Amendment right to a unanimous verdict, which "fundamentally implicates" the integrity of the fact-finding process,[20] should not be made to rest on an assumption when the defendant has requested specific protection through a jury instruction.

Without such an instruction there is simply no way of assuring that the verdict is truly unanimous. The jurors themselves may otherwise not even be aware of

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[19] One count of the indictment in *Pavloski* charged both converting and embezzling by means of forged checks, and skimming cash dues and initiation fees, in violation of 29 U.S.C. § 501(c). 574 F.2d at 936.

[20] *Brown* v. *Louisiana,* —— U.S. —— (1980) (100 S.Ct. 2214, 2223) (plurality opinion of Justice Brennan).

their differences. A vote of twelve to convict on the conspiracy count would not reveal, for example, that six jurors concluded petitioner had entered into an agreement different from that found by the remaining jurors. The growing complexity of federal criminal trials, as illustrated by this case, increases greatly the need for specific unanimity instructions in such situations and the danger that a verdict of guilty on a count charging two offenses does not represent the conclusion of all twelve jurors that the defendant committed the same offense.

The issue presented is significant. Only this Court can cure the "unfortunate" lack of clarity regarding the scope of a federal defendant's right to a unanimous verdict.[21] The constitutional issue is squarely raised and review by this Court is warranted.

II.

The second important issue raised by this case is whether a federal judge, in a Travel Act prosecution, can substitute his judgment for that of a state legislature in defining the illegal conduct under state law that serves as a basis for violation of the Act.[22]

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[21] See Judge Wisdom's opinion for the court in *United States* v. *Gipson*, *supra*, quoted at pp. 14-16, *supra;* and Judge Feinberg's remarks about the need for Supreme Court review in *United States* v. *Murray*, *supra*, quoted at p. 13 *supra*.

[22] As set forth more fully above, pp. 12-13 *supra*, the conspiracy count charged two district theories of illegality—a Goldfarb-centered conspiracy and a Tamer-centered conspiracy. Both theories were grounded in the respective defendant's alleged violation of the Travel Act. The manner in which the trial court instructed the jury required that both theories be valid. As the trial court conceded, if either theory were incorrect, the verdict must be set aside (Pet App. 62a, n.3). Thus, if the court's interpretation of the Travel Act respecting petitioner's conduct is erroneous, his conspiracy conviction must be reversed.

The Travel Act is peculiar among federal statutes. It prescribes the use of any facility of interstate commerce with the intent to engage in "unlawful activity", a phrase the Act defines as "violation of the laws of the State[s]." 18 U.S.C. § 1952(b). As this Court has observed, "the federal [offenses] are defined by reference to existing . . . law." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In the Act, Congress struck a delicate balance between the traditional initiatives of the states and the interests of the federal government in a more aggressive response to organized crime. In so doing, Congress allowed federal law enforcement authorities to undertake prosecutions in certain limited situations where, although no substantive federal criminal statutes had been violated, certain state offenses had been committed through the use of the facilities of interstate commerce. The statute represents a considerable intrusion into an area previously reserved to the states and, accordingly, this Court has recognized the need for a narrow interpretation in order to avoid altering "sensitive federal-state relationships." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). *See also United States* v. *Bass*, 404 U.S. 336, 349-350 (1971).[23]

The view of the Travel Act adopted by the courts below dramatically shifts this careful balance, granting prosecutorial authority to the federal government and criminal jurisdiction to the federal courts far beyond that contemplated by Congress. The courts below abandoned the requirement that a defendant's conduct must

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[23] The Travel Act did not expand the category of proscribed behavior or make unlawful any conduct that had been previously unregulated. Instead, it converted existing state criminal laws into federal offenses. The Act thus enabled federal law enforcement authorities to assist the states in enforcing their laws.

violate an "existing state law" as positively enacted by the state legislature. Instead, the district court declared what it thought the state law sought to be, and found petitioner's violation of that construction sufficient to justify prosecution under the Travel Act.

Such an expansive interpretation of the Travel Act far exceeds the intentions of Congress, misinterprets the decisions of the Court, raises serious questions about the vagueness of the statute, and has significant federalism implications. Here there was no Nevada criminal statute proscribing petitioner's conduct. Nonetheless, the trial court held the Travel Act to be applicable because petitioner's conduct offended the policy underlying Nevada's statutory and regulatory framework. The court found, that viewed from a "federal point of view," petitioner's conduct was unlawful and could therefore provide the necessary predicate for a Travel Act violation.[24] A federal court in Michigan thus read into Nevada law a statute the Nevada legislature had never enacted.

The "crime" petitioner ostensibly committed was conspiring to conceal his role in the management of the Aladdin Hotel from the Nevada Gaming Commission. Pet. App. 58a n.1. Such concealment is not a crime under the Nevada Revised Statutes, as the government

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[24] As the court explained in colloquy with counsel (App. 945):

I would say it is the unlawful activity within the state viewed from the federal point of view.

. . .

That's different from saying the unlawful state activity. There may not be any unlawful state activity if you look at it from the standpoint, simply from the way a Nevada judge would look at it.

conceded.[25] The district court, in its instructions and in its post-trial opinion described "the illegal conduct alleged against Tamer [as] causing to be concealed or aiding in the concealment of his true role at the casino—in violation of Regulation 3.100.1" (Pet. App. 58a n.1). The Nevada Gaming Commission is authorized by

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[25] The following colloquy occurred during argument on motion for judgment of acquittal (App. 932-933):

THE COURT: [I]f this prosecution were going on in Nevada, if this were not a Travel Act violation, if this were not Federal Court, if this were a State prosecution, there would be a great difficulty in this, would there not? There is a hole in the Nevada statute, is that not right?

[DEFENSE COUNSEL]: Absolutely.

[PROSECUTOR]: There are a lot of holes in the Nevada statute.

THE COURT: No, there is a significant hole in the Nevada statute as a state procedure?

[PROSECUTOR]: Yes, and that is entirely irrelevant to this Court's determination.

At a later point, the court inquired further (App. 940-941):

THE COURT: If I hear you correctly, what you are saying is that even though this may not be a violation under Nevada law, that under federal law, under *Nardello* [*United States* v. *Nardello*, 393 U.S. 286 (1969)], the concealment by the defendants here is a crime here, because otherwise the whole statutory scheme could be evaded.

[PROSECUTOR]: That's correct.

The government reaffirmed this position in a submission to the court at the conclusion of trial, entitled *Government's Theory of the Case* (App. 283):

> [E]ven though concealing the name of a person who is in fact a gaming employee is not a violation of a specific Nevada statute, the 'strong State policy on gaming' has *disclosure* as its linchpin. Unless those charged with regulating gaming know who is *conducting* gaming, the entire investigative and review process at the State level becomes meaningless charade. The Nevada law pertinent to this case cannot reasonably be interpreted to have been enacted as an empty gesture.

statute to promulgate regulations in the public interest (Nev. Rev. Stat. § 463.150) and has certain authority to enforce its regulations, but a violation of those regulations is not a criminal offense, as the government also conceded (see pp. 8-9 *supra*).

Although there was thus no state statute on which to base petitioner's federal offense, the trial court held that it was not bound by the limitations of the state criminal code in defining "unlawful activity" under the Travel Act:

> [W]e are concerned with a question of federal law; namely, the existence or non-existence of a Travel Act violation. I am not directly concerned with the content of the Nevada Gaming law. (Opinion Denying Motion to Dismiss, Pet. App. 32a.)

Instead, the trial court ruled that the state law must be examined from a "federal view" and from that perspective the court must make a judgment whether a "violation of the laws of the State" had occurred:

> The federal judiciary is empowered to declare the governing law in areas that are substantially related to a program of national governmental operation. . . . I view the issue as federal incorporation of state law by reference. That is, the Travel Act incorporates Nevada state law in the area of gambling. Considered thus, even more latitude inheres in the federal judiciary. (Pet. App. 34a-35a.)

The trial court examined the policies underlying Nevada's regulation of gambling and concluded that the kind of conduct engaged in by petitioner could result in the evasion of the entire statutory scheme. Therefore, although no specific state statute made con-

cealment unlawful, it was nonetheless "unlawful activity" when considered from a "federal viewpoint."

In the trial court's view, the federal government was thus not to be restricted by either the state legislature or the state courts:

> To saddle the federal government with the state's interpretation would allow the state to eviscerate the Travel Act and frustrate a federal solution to a problem of national scope. . . . It would be self-defeating for the federal government to adopt state notions of illegality. (Pet. App. 35a.)

In adopting this broad notion of the authority of federal courts, the trial court relied upon this Court's decision in *United States* v. *Nardello*, 393 U.S. 286 (1969), which it interpreted as holding that state law does not control and that "the essential question is whether the type of activity under prosecution is generally or usually of a type subject to criminal sanctions" (Pet. App 36a), an interpretation the court adhered to throughout the trial. See n.25 *supra*.

The lower court's reading of *Nardello* constitutes an unwarranted and extraordinary expansion of the Travel Act. *Nardello* held only that the determination whether a defendant's conduct is "unlawful activity" under the Travel Act does not turn on the particular label a state legislature attaches to a criminal statute, but whether the conduct involved is, in fact, in violation of an existing state law. (The indictment charged "extortion"; the statute was labeled "backmail.") 393 U.S. at 539. The premise of *Nardello*—and the Travel Act—is that the defendant's conduct or intended conduct must be proscribed by some state criminal statute. See *Perrin* v. *United States*, *supra*, 444 U.S. at 48; *United States* v. *Hiatt*, 527 F.2d 1048 (9th Cir. 1975);

*United States* v. *Kahn*, 472 F.2d 272 (2nd Cir.), cert. denied, 411 U.S. 982 (1973); *United States* v. *D'Amato*, 436 F.2d 52 (3rd Cir. 1970). In the absence of such a state penal law there can be no federal offense, as the court held in *United States* v. *Gordon*, 464 F.2d 357 (9th Cir. 1972), a prosecution based on a violation of Nevada Gaming Regulations and a case the court of appeals here sought to distinguish (Pet. App. 14a).[26]

Neither *Nardello* nor any other decision of this Court has held—as the district court stated—that the issue underlying the applicability of the Travel Act is whether the "unlawful activity" is of a type "generally or usually . . . subject to criminal sanctions" (Pet. App. 36a). In every case the question has been whether the violation of a specific, existing state criminal statute may form the predicate for a Travel Act violation. *See United States* v. *Nardello*, *supra* (Pennsylvania blackmail statutes); *Rewis* v. *United States*, *supra* (Florida anti-lottery laws); *Erlenbaugh* v. *United States*, 409 U.S. 239 (1972) (Indiana bookmaking statute); *Perrin* v. *United States*, *supra* (Louisiana commercial bribery statute).

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[26] Both the trial court and the court of appeals relied heavily on another Ninth Circuit decision, *United States* v. *Polizzi*, 500 F.2d 856, cert. denied, 419 U.S. 1120 (1975). Unlike this case, the prosecution there was based on a violation of a specific section of the Nevada code, (Nev. Rev. Stat. § 463.170), which required that "all persons having any direct or indirect interest [in a corporation holding a gaming license] . . . whether financial, administrative, policy making or supervisory" be qualified to be licensed. While that statute might arguably have addressed petitioner's conduct, it has since been repealed. Contrary to the court's holding here, *Polizzi* held that "[a] violation of § 1952 . . . must be premised upon another distinct violation of state or federal law" *Id.* at 869.

The contrary view, adopted by the trial court here in its opinions and its instructions—a view sanctioned by the court of appeals—expands the Travel Act to encompass not only state criminal offenses but also state non-penal regulatory violations that a federal court believes ought to be criminal offenses. Such an unbounded interpretation of the authority of the federal judiciary in Travel Act prosecutions is inconsistent with the intention of Congress, is a serious threat to "sensitive federal-state relationships" (*Rewis* v. *United States, supra,* 401 U.S. at 812), and is completely at odds with this Court's decisions seeking to contain the Travel Act within its proper limits.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CHARLES GOLDFARB, JAMES TAMER, JAMES ABRAHAM, EDWARD MONAZYM, AND THE ALADDIN HOTEL CORPORATION, *Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 5, 1981.

Before: WEICK, LIVELY and BROWN, Circuit Judges.

WEICK, Circuit Judge. Appellants Charles Goldfarb and James Abraham appeal from judgments of conviction entered upon jury verdicts of guilty of the substantive offense prescribed by the Travel Act, 18 U.S.C. § 1952.[1] All

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[1] 18 U.S.C. § 1952 provides in pertinent part that:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

• • •

(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States, . . .

of the appellants appeal from judgments of conviction for conspiracy to violate the Travel Act, 18 U.S.C. § 371.[2] The appeals were consolidated for oral argument.

The appellants raise a number of issues on appeal[3] in their separate briefs. Each appellant assigns errors which

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[2] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] These include the following:

(a) Appellant Tamer raises issues dealing with the denial of his right to a unanimous verdict, the trial court's failure to exclude certain evidence, the court's instructions to the jury and denial of his motion to suppress.

(b) Aladdin contends that the conspiracy against it was a legal and factual impossibility; that the indictment should have been dismissed for vagueness or in the alternative that the court erred in failing to grant the motion for a bill of particulars; and that the court erred in failing to grant its motion for severance.

(c) Abraham contends that the evidence against him was insufficient to support his conviction; that certain evidence of an uncharged conspiracy should not have been admitted; that certain *in camera* proceedings conducted to the exclusion of Abraham constitute reversible error; and that he was entitled to a mistrial as a result of the prosecution's allegedly irrelevant and prejudicial questioning of a character witness.

(d) Monazym challenges the sufficiency of the evidence against him; alleges the existence of multiple conspiracies and preju-

pertain specifically to the government's case against him, and the appellants together present a number of common arguments. One such common argument has several facets and is variously formulated by each appellant. It relates to the treatment by the court of Gaming Regulations promulgated by the Nevada Gaming Commission pursuant to statutory authority, violations of which appellants claim do not constitute unlawful activity as prohibited by the Travel Act.

Disrict Judge Feikens carefully considered all of these issues in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458. We agree with his decision and affirm the judgments of conviction for the reasons set forth therein on which we will elaborate hereinafter.

Judge Feikens denied a pretrial motion of the defandants to dismiss the indictment in an opinion reported in *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979) in which he ruled upon the constitutionality of the Nevada Gaming Control Act and held it was not unconstitutional as being violative of the due process rights of defendant Goldfarb who was denied a gaming license.

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dicial variance; and claims violations of his 6th Amendment right to counsel as a result of the *in camera* proceedings which were conducted to his exclusion.

(e) Other aspects of the "common argument" involve variance and amendment of the indictment, and misstatements and misconstructions of Nevada statutes and regulations.

(f) Each appellant expressly adopts the arguments of his co-appellants to the extent they apply pursuant to the Federal Rules of Appellate Procedure, Rule 28(i).

All of these issues were carefully considered by District Judge Feikens in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458.

In these appeals, the parties have filed four volumes of appendices, 4,000 pages of transcripts, and tapes recording conversations played for the jury but not included in the transcripts.

Mostly issues of law are raised in the briefs. The brief of Goldfarb's counsel commendably states: "The sufficiency of the evidence to sustain the jury verdict is not in question here."

Goldfarb had a remedy in the state court of Nevada which he invoked to compel the issuance of a license to him but he dismissed the suit. The trouble here is that Goldfarb and the other defendants, by concealment and violation of Nevada statutes and their implementing regulations authorized by the statutes, were actually engaged in the illegal unlicensed management, maintenance, control and operation of the hotel and casino.

I

Defendant-appellant Charles Goldfarb was a bondsman who resided in Birmingham, Michigan. In 1971, he and a small group of investors purchased the Aladdin Hotel and casino, located in Las Vegas, Nevada, which at that time was owned by the Recrion Corporation. Goldfarb then applied to the State Gaming Control Board/Nevada Gaming Commission for licensure as a stockholder-officer of the new corporation, Aladdin Hotel Corporation. His request was denied when the Navada Gaming Commission determined that he had an "unsuitable background and unsuitable associations." Goldfarb then divested himself of his eight percent (8%) interest in the hotel-casino. He later acquired an option to purchase stock from a licensed stockholder of the new corporation and reapplied for a stockholder's license. That application is still pending and has not been ruled upon by the Commission. Apparently, it has not been pressed.

The bulk of the evidence presented against the appellants consisted of over 100 telephone conversations intercepted by the government agents pursuant to court authorization. In all, approximately 15,000 calls were intercepted. The conversations introduced at trial were between Goldfarb and his co-defendants: James Tamer, the Entertainment Director of the Aladdin; James Abraham, the Executive Vice-President and General Manager of the Aladdin, and Edward Monazym, a Casino employee, as well as some calls between third parties and the various co-defendants.

The evidence adduced at trial showed that Goldfarb, having failed in his attempt to become a licensee owner of the hotel casino, did with the aid of the other defendants, maintain a secret and illegal role in the ownership, operation, conducting and carrying on of the gaming operations of the hotel casino. He recommended complimentary services, including free accommodations, for certain customers and had a hand in arranging for the extension of credit for individuals whom he sent to the hotel. His advice and assistance was sought and given concerning certain financial problems of the hotel as well, including arrangements for emergency financing with false net worth statements to an unnamed bank or banks and also possible sale or lease of the hotel. He finally arranged for a loan from the Teamsters Pension Fund. The government contended that this was in keeping with the defendants' scheme to engage in the clandestine ownership, conducting and carrying on of the gaming operations of the Aladdin by persons not licensed to do so and whose interest in the casino had been concealed from the state in violation of certain Nevada statutes and regulations.

The defendants contended that the evidence was perfectly consistent with the fact that Goldfarb was a valued customer of the casino; a former investor, and possibly a future stockholder-officer of the corporation; a close associate of the management personnel of the hotel; and an

individual who had used his contacts to direct many so-called "highrollers" to the hotel, many of whom then became regular customers who lost large sums in gambling.

This was a disputed issue of fact requiring resolution by the jury.

The Travel Act, as applied to the instant case, required that a facility of interstate commerce (here a telephone) be used to promote, establish, carry on, etc., an unlawful activity. "Unlawful activity" is defined as any business enterprise involving gambling offenses in violation of the laws of the state in which they are committed.[4]

There is some dispute as to the nature and essentiality of the underlying state law violation, although most decisions agree that it is the violation of federal law which is the gravamen of a Travel Act offense. *United States* v. *Prince*, 529 F. 2d 1108 (6th Cir. 1976), *cert. den.*, 429 U.S. 838; *United States* v. *Polizzi*, 500 F. 2d 856 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975). Some courts hold that proof of the commission or attempted commission of a state defined criminal offense is an essential element of a Travel Act conviction, *United States* v. *Hiatt*, 527 F. 2d 1048 (9th Cir. 1975); *United States* v. *Polizzi, supra; United States* v. *Kahn*, 472 F. 2d 272 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, while others hold that it is not. *United States* v. *Prince*, 515 F.2d 564 (5th Cir. 1975), *cert. den.*, 423 U.S. 1032; *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979). It is certainly true that the state crime need not be actually accomplished. *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir. 1975), *cert. den.*, 423 U.S. 874.

It is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engaged in some form of unlawful activity prohibited by the law of the State of Ne-

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[4] See footnote 1, *supra*.

vada. This contention is beyond dispute and amply supported by the language of the Act and by the case law.

## II

The defendants-appellants were indicted on a four-count Revised Indictment.[5] In Count One of the indictment, Goldfarb was charged with a substantive violation of the Travel Act. The alleged "unlawful activity" was the

> ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming casino, the ALADDIN HOTEL AND CASINO, by a person who was not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada Revised Statutes, Sections 463.160.1(a)[6] and 463.335,[7] and Nevada

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[5] The original indictment consisting of 22 counts was found to be multiplicitous by the trial court.

[6] NRS § 463.160(1)(a) provides:

> License required.
>
> 1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:
>
> (a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or spots pool;
>
> • • •
>
> without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

[7] NRS § 463.335 provides in pertinent part:

> Gaming employees required to hold work permits; hearings and review; confidential records; expiration of work permits.

Gaming Commission Regulations 3.100 paragraph 1, (b), (d), (f), (g) and (i), 3.100 paragraph 3,[8] 3.110[9] and 8.060.[10]

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1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;
(2) Cashiers;
(3) Dealers;
(4) Floormen;
(5) Hosts or other persons empowered to extend credit or complimentary services;
(6) Keno runners;
(7) Keno writers;
(8) Machine mechanics;
(9) Security personnel;
(10) Shift or pit bosses;
(11) Shills; and
(12) Superivsors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages. . . .

[8] Nevada Gaming Commission Regulation 3.100 provides in pertinent part:

Employee report.

1. Annually, on or before the 15th of July, each nonrestricted licensee, as defined in Reg. 4.030.1(b), shall submit an employee report to the board on a form to be furnished by the board. The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such nonrestricted licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:

. . .

(b) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are

The indictment alleges specific acts committed by Goldfarb in the course of the performance of the unlawful activity.

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ordinarily sought or followed:

. . .

(c) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno or bingo games, slot machines, race or sports books, pari-mutuel operations, or any persons having authority to supervise or direct such persons;

. . .

(f) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;

(g) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance, review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to Reg. 6;

. . .

(i) All individuals who individually or as a part of a group formulate management policy.

. . .

3. Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar year shall be reported to the board in writing no less than 10 days after the end of the calendar quarter during which the change, addition, or deletion occurred.

[9] Nevada Gaming Commission Regulation 3.110 provides in pertinent part:

Key employee.

1. Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee

Appellant Tamer was acquitted by the jury of the substantive Travel Act count but was convicted of conspiracy.

Count Three charged appellant Abraham with a substantive violation of the Travel Act in much the same language

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or who is listed or should be listed in the annual report required by Reg. 3.100 is a key employee.

2. Whenever it is the judgment of at least 3 members of the commission that the public interest and the policies set forth in Nevada Revised Statutes Chapter 463, the Nevada Gaming Control Act, will be served by requiring any key employee to be licensed, the commission shall serve notice of such determination upon the licensee. The commission shall not be restricted by the title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Nevada Gaming Control Act include but are not limited to the following:

(a) The key employee is new to the industry, the particular gaming establishment, the position, or the level of influence or responsibility which he has and the board or commission has little or outdated information concerning his character, background, reputation, or associations, or

(b) Information has been received by the board or commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.

[10] Nevada Gaming Commission Regulation 8.060 provides:
Participation in operations. Except as and to the extent provided in these regulations pertaining to emergency situations, or on written approval of the commission, no person who proposes to acquire an interest in any licensed gaming operation, in a licensee or in a holding company shall in connection therewith take any part or be permitted to take any part whatever, as an employee or otherwise, in the conduct of such gaming operations or in the operation of the establishment wherein such gaming operations are conducted during the pendency of his application for license or to be permitted to acquire such interest.

as the charge against Goldfarb. The alleged unlawful activity was based upon the same Nevada Statutes and Regulations.[11] Abraham was alleged to have discussed with Goldfarb the extension of complimentary privileges to patrons of the Aladdin which constituted, directly or indirectly, the administration, supervision and influence of Goldfarb over the gaming operations of the Aladdin with the consent and assistance of Abraham and in violation of the aforementioned statutes and regulations. Abraham was convicted on this count.

Count Four is the conspiracy count of the indictment on which all of the defendants were convicted. It charged that the defendants willfully and knowingly conspired to use facilities of interstate commerce to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely, the ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming Casino by persons who were not licensed to do so and whose interest in the gaming casino had been concealed from the State of Nevada and did thereafter commit acts in order to promote this unlawful activity, all in violation of 18 U.S.C. § 1952, 18 U.S.C. § 371.

As before stated, the appellants filed two joint motions to dismiss the original indictment. Those motions apply equally to the revised four-count indictment. In the motion the appellants argued, *inter alia*, that Nevada Gaming Commission Regulations are not "law" for the purposes of criminal prosecutions. From the earliest stages of the proceedings, the defendants objected to and expressed concern over the notion that a violation of a Nevada Gaming Commission regulation could form the predicate state law viola-

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[11] The statutes and regulations relied upon are identical except that Count Three omits Nevada Gaming Regulation 3.100(1)(b) and (g).

tion required for a federal prosecution under the Travel Act. It could not in and of itself.

In response to the motion to dismiss, the government stated that:

> . . . the predicate "unlawful activity" in this prosecution arises from the violations of the cited Nevada *statutes* in each count. The additional citation to the regulations is solely to provide additional particularity in indicating the application of the statute to the specific activity described in each count. We do not quarrel with the defense position that violations of the regulations in and of themselves are not criminal acts within the purview of the Travel Act. . . .
>
> We do not quarrel that the defendants would be entitled to a charge that in order to find a defendant guilty of a particular count that it must find a defendant violated the provisions of the Nevada statute cited and described therein.
>
> (Government's Response to Motion to Dismiss Appendix p. 138-39.)

Still claiming inability to comprehend and therefore defend against the charges, the defendant's filed a joint motion for a bill of particulars. The court requested the parties to agree among themselves as to the particulars which they apparently did.

The court instructed the jury as follows:

> Now as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to have enacted regulations which have the force of law. It is that law which defines unlawful activity.

In *Berman* v. *Riverside Casino Corp.*, 247 F. Supp. 243, 248 (D. Nev. 1964), *aff'd* 354 F. 2d 43 (9th Cir. 1965), the court held that regulations promulgated by the Nevada Gaming Commission "have the force and effect of law." Cf. *United States* v. *Polizzi*, 500 F. 2d 856, 875 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975).

N. R. S. 463.1594 specifically provides that the regulations are intended to implement the provisions of the statutes requiring disclosure of a corporate licensee's key personnel. Also, N.R.S. 463.150(2)(a) provides that the regulations shall prescribe "the method and form of application which any applicant for a gaming license . . . shall follow and complete . . . ." The court was thus required to include an instruction on regulations so that the jury would not completely disregard them. The court did not instruct the jury at any place that a violation of a regulation, in and of itself, constituted an "unlawful activity." To give such an instruction would have been prejudicial error. *United States* v. *Eaton*, 144 U.S. 677 (1892); *Singer* v. *United States*, 323 U.S. 338 (1944).

In *United States* v. *Grimaud*, 220 U.S. 506, 517 (1910) the court stated:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Reliance by appellants on *United States* v. *Gordon*, 464 F. 2d 357 (9th Cir. 1972) is misplaced. That case held that bookmakers and their employees do not engage in illegal gambling business within the prohibition of federal law by violating nonpenal regulations of state gaming commission. *Gordon* appears to be somewhat in conflict with the subsequent decision of the Ninth Circuit in *Polizzi* and is not even cited or discussed in *Polizzi*.

In *United States* v. *Seelig*, 622 F. 2d 207, 210 (6th Cir. 1980), we considered violations of the Controlled Substances Act, 21 U.S.C. § 841(a)(1) and regulations promulgated thereunder which were authorized by Congress. There, as here, the defendants contended that violations of the regulations did not constitute an offense. We stated:

> The combination of § 829(c) and § 822(b) thus requires a person to dispense or distribute a schedule V drug for a medical purpose and to be within the authority of their registration as determined by the Attorney General. Section 822(a) requires every person who distributes or dispenses controlled substances to register with the Attorney General. Section 821 authorizes the Attorney General to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances. Section 871(b) authorizes the Attorney General to promulgate and enforce rules, regulations and procedures that he deems necessary for the efficient execution of his functions.
>
> Although Congress was not as clear in this statute as in the one involved in *Grimand*, this Court is satisfied that the statute does expressly, albeit in a convoluted fashion, provide that a violation of the promulgated rules constitutes an unlawful act under the Controlled Substances Act. Thus, counts 1-165 do charge crimes.

During the presentation of evidence to the jury in response to the defendants' and the trial court's desire to

have the legal theory of the case made clear, the government filed a document entitled "Government's Theory of the Case." Here again, the government disclaimed reliance upon the Nevada Gaming Regulations alone, stating that: "to be sure, a violation of the Regulations which is not concomitant with a statutory violation will not support a Travel Act violation." (Appendix, p. 283)

Thus the violation of the Nevada statutes and implementing regulations would constitute unlawful activity under the Travel Act. The disclosure provisions required by Regulation 3.100 are cumulative to those contained in the Nevada statutes. N. R. S. 463.165, 463.339, 463.520, 463.530, 463.560.

In any event, under the conspiracy count, the violation of the regulations alone would certainly be considered as overt acts by the defendants committing them which are ingredients of the crime of conspiracy

III

With this principle in mind, we now turn to the trial court's instruction to the jury on the meaning of "unlawful activity" and the significance of the Nevada Gaming Regulations.

The court first instructed the jury on Count IV of the indictment, the conspiracy charge. After preliminary matters of defining conspiracy and its elements to the jury, the court began to instruct on the application of the Travel Act. After reading the Act, in pertinent part, the court instructed on the meaning of the phrase "unlawful activity." As a general background, the court instructed as follows:

> . . . the state of Nevada has a comprehensive scheme of regulatory statutes. Under these statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations

which have the force of law. It is that law which defines unlawful activity.

In order to regulate gambling under Nevada law these statutes require full disclosures. Only through full and accurate disclosure of all persons who are connected with gambling in Nevada can the Nevada gaming authorities perform their functions in excluding from the industry all who are in the authorities' opinions, unsuitable or undesirable for any number of reasons. (Appendix 1205-06)

The court further instructed the jury on unlawful activity based upon a violation of Nevada statutory law as follows:

Nevada Revised Statute 463.530 requires that all persons who require [sic] to become owners or shareholders in a gaming operation must have come before the Nevada gaming authorities for determination as to the suitability for license. The Nevada gaming authorities then make a decision whether to then issue a license to an applicant. If they deny the applicant a license, that person may not then thereafter exercise any ownership of, operation, conduct of the gaming affairs of the casino.

Another Nevada statute, NSR 463.130, states that the violation of these Nevada gaming statutes is a crime, a gross misdemeanor. Thus, by concealment of his ownership or operation or conduct in the gaming conspiracy, a person may violate the Nevada laws.

Keep in mind it is not the concealment itself which is the violation of the statute I have just discussed but rather the violation is the unlicensed ownership or operation of the gaming casino which is accomplished by concealment. (Appendix, p. 1206-07)

The court then continued:

> I now take up another aspect of the Nevada laws on gambling. One of the regulations, [3].100, which is mandated by Nevada statute is required, [sic] all holders of non-restricted licenses to disclose to the Nevada gaming authorities names of all persons exercising significant control and influence over gaming. Any changes in such activities must also be reported to the Nevada gaming authorities because of a strong state policy requiring disclosure of all persons who have significant control and influence as to gaming, and because of the statutory command that all gaming licenses which, whether held by a corporation such as the Aladdin Hotel or by individuals, must be maintained in conformity with all relevant provisions.
>
> I instruct you that it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities. The essence or gist of the violation I have just outlined is concealment, for which failure to disclose, this must be contrasted with the first instance of violation I described earlier, that violation having to do with an unlawful or unlawful licensing violation of the Nevada casino, where the concealment is a means to achieve the violation but not itself the actual unlawful activity. (Appendix, p. 1207-08)

This in our opinion correctly stated the Nevada law.

In the instruction on the substantive offense charge against Goldfarb, the court stated that:

> [h]eretofore I have discussed with you in considering the charge of conspiracy as to entail the meaning of the phrase unlawful activity. Without repeating those in-

> structions that I gave you then with the request that you keep them in mind here, I specifically charge you that the unlawful activity which it is alleged the defendant Goldfarb engaged in is as follows: . . .

The court then described a statutory theory based on Nevada Revised Statutes § 463.335 as was done in the conspiracy charge. In concluding the instruction, the court again offered the jury the elements of unlawful activity:

> Additionally, in order for you to find the Defendant Goldfarb guilty of the charges contained in Count I of the indictment, the Government must also prove beyond a reasonable doubt either that:
>
> (1) Defendant Goldfarb willfully engaged in the ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or;
>
> (2) Defendant Goldfarb willfully concealed his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed.
>
> Or both of these elements. (Appendix pp. 1217-18)

This instruction was not duplicitous as claimed for either or both elements constitute an offense under Nevada law. The jury was also instructed that its verdict had to be unanimous.

In its opinion denying post trial motions, the court relied on the Nevada statutes which it stated were broad enough to encompass Goldfarb's conduct. (App. 440)

## IV

The indictment charged Tamer with violating NRS 463.-160.1(a) and Nevada Gaming Commission Regulations

3.100(1)(i), 3.100(3) and 3.110. He was charged with performing as a "key employee" without being licensed to do so. Tamer was acquitted of the substantive Travel Act violation.

After reading the indictment and summarizing the Travel Act, the court instructed on the meaning of "unlawful activity" as follows:

> Under Nevada gaming laws a casino (or non-restricted licensee as it is called) must report to the Nevada Gaming Authorities the identity of anyone who is directly or indirectly involved in the casino's administration, that is, anyone who has a significant influence and control at the casino. The regulation that requires this disclosure has the force of law and its requirement of disclosure is in harmony with a number of other Nevada gaming statutes. Thus, under Nevada gaming law, it is required that the casino disclose the identity of anyone exerting significant influence and control at the casino. The disclosure is necessary so that the Nevada Gaming Authorities can regulate gambling by determining that such a person should be licensed, if he is to continue the exercise of significant control and influence at the casino. Now, the Aladdin itself is not charged with the violation. However, defendant Tamer is; it is charged in this indictment that defendant Tamer did, in concert with the Aladdin, cause his true role at the casino to be concealed from the Nevada Gaming Authorities, in violation of Nevada gaming laws.

**V**

As to Abraham, the district court in instructing on Count III of the indictment again carried through its interpretation of "unlawful activity." The court charged the jury as follows:

> The unlawful activity here charged is a certain kind of unlawful activity as is charged in Count I against De-

fendant Goldfarb, although the telephone call alleged in the indictment between defendant Goldfarb and defendant Abraham occurred on March 15, 1977. (Appendix pp. 1226-27)

* * *

Additionally, in order for you to find defendant Abraham guilty of the charges contained in Count III of the indictment, the Government must also prove beyond a reasonable doubt that defendant Abraham aided and abetted defendant Goldfarb in either willfully engaging in the ownership, operation, or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or in aiding and abetting the defendant Goldfarb in willfully concealing his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed; or both of these elements. (Appendix p. 1229)

Thus the district court instructed the jury on the unlawful activities; one based on the unlicensed operation of the Aladdin; the other based on concealment which found its origin in the court's construction of the Nevada Statutes and Gaming Regulations, especially 3.100. In our opinion these instructions were correct.

## VI

Goldfarb contends that there was a variance between the allegations in the indictment and the evidence which resulted in a judicial amendment of the indictment. Judge Feikens correctly dealt with these issues in his opinion denying post trial motions stating:

It appears Goldfarb alludes to principles of variance and amendment. The two concepts are closely related. Variance refers to the failure of the government's

proofs to conform to the indictment. A variance is not fatal to the prosecution unless the defendant could not reasonably have anticipated from the indictment what evidence would be presented at trial or unless the indictment is so vague as not to bar subsequent prosecution on the same offense. *United States* v. *Knuckles,* 581 F 2d 305, 309-311, (2nd Cir), *cert. denied* 99 S Ct 581 (1978); *United States* v. *Fruehauf Corp.,* 577 F 2d 1038, 1056 (6th Cir), *cert. denied* 99 S Ct. 349 (1978); *United States* v. *Dunn,* 577 F 2d 119, 123 (10th Cir 1978); *Watson* v. *Jago,* 558 F 2d 330, 333-34 (6th Cir 1977); *United States* v. *Maselli,* 534 F 2d 1197, 1201-1202 (6th Cir 1976). A variance is not ground for reversal unless the defendant's substantial rights are abridged. *United States* v. *Berger,* 295 U.S. 78, 82 (1934). In this case I find no prejudicial variance.

The apparent amendment claim needs more analysis, but it too is without merit. It is settled since *Ex Parte Bain,* 121 U.S. 1, 10 (1887) that neither the court nor the prosecutor may substantially change the indictment to "suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes . . ." This is in keeping with the principle that a court may not establish standards of conduct upon pain of imprisonment; such is the legislature's domain. An amendment to the indictment is *per se* reversible error. *United States* v. *Crocker,* 568 F 2d 1049, 1059 (3rd Cir 1977), *United States* v. *Fruehauf, supra,* at 1056. An amendment may be express or "constructive" (effective). *Id.* In determining whether there has been a constructive amendment inquiry should focus on whether any essential element of the crime was proved by facts different than those alleged. *Stirone* v. *United States,* 361 U.S. 212 (1960). Thus, if the indictment alleges one sort of false testimony but the government is permitted to prove another sort, false testimony being

necessary for conviction, an amendment has occurred. *United States* v. *Crocker, supra.* Similarly, in a Hobbs Act case, if a grand jury alleges one sort of interstate nexus while proof and argument show another, an amendment has occurred. *Stirone* v. *United States, supra. See United States* v. *Prejean,* 494 F 2d 495, 497 (5th Cir 1974); *United States* v. *Vesaas,* 586 F 2d 101, 103 (8th Cir 1978).

In this case, there were three elements the government was required to prove: (1) the use of an interstate facility; (2) actual or attempted promotion, etc. of an unlawful activity; (3) specific intent. *United States* v. *Prince,* 529 F 2d 1108, 1112 (6th Cir), *cert. denied* 429 U.S. 838 (1976). The proofs did not diverge from the course established by the requirement of these elements. The only apparent argument available to Goldfarb (and the other Defendants) is that the grand Jury did not pass upon the exact shape of the illegal acts in Nevada, which it is their constitutional right to have done. I find this contention without merit. The grand jury needed to know enough of the Nevada gaming laws to make the indictment sufficient, which it did. My interpretation of Nevada gaming law presented Defendants with no new factual charges that they were required to meet, to use variance phraseology, nor did it allow either proof or argument of a new factual basis for any element of the crime, to use amendment terminology. Moreover, the allegation as to the Nevada offense was broad enough to include the specific crime I have already explained. It has often been held that one way to guard against a constructive amendment claim is to draft an indictment with generality, *United States* v. *Crocker, supra,* at 1059, so long as it contains the necessary specificity.

VII

We find no prejudicial error in the court's denial of Abraham's motion to declare a mistrial because of improper cross-examination of a character witness. One of the character witnesses was General Ralph G. Taylor retired from the United States Air Force. Attempts were made by Abraham's attorney to introduce into evidence Abraham's gallantry as an officer and pilot, his two tours in Vietnam and his communications with the White House. The court excluded such evidence. We agree that it was not admissible except upon conviction to be considered in mitigation of the sentence. Error was assigned as to the cross-examination of the character witness Lovell, a former city attorney in Las Vegas, who volunteered that Abraham enjoyed a good reputation with Nevada's "law enforcement community." He was asked upon cross-examination whether he had heard that in order for a shop or store to do business with Aladdin Hotel Corporation to obtain store space in the area that payments were made personally to Abraham, not to the corporation. Lovell answered, "No, I don't know that." Before asking the question at a side bar conference with the court not in the presence of the jury, the government produced evidence showing justification namely, the cancelled check and the court permitted the question to be answered and gave proper instruction to the jury as to its purpose. Further proceedings developed thereafter including rebuttal and surrebuttal evidence and when it appeared to everyone that this was creating a trial within a trial, the government moved to withdraw the question, in which counsel for Abraham joined. The trial court granted the motion finding that " . . . the spirit of *Michelson* v. *United States,* 335 U.S. 469 (1948) had been observed and the prejudice, if any, was dissipated in Abraham's favor." App. 452, 453. We find no abuse of discretion on the part of the District Judge in his handling of these issues.

Abraham and Monazym assign error because the trial court held certain *in camera* proceedings to which they were not admitted. Abraham and Tamer assign error in the admission of evidence of tape recorded conversations and documents tending to prove that Goldfarb and Tamer used their influence with Leonard, the Prosecuting Attorney of Genesee County in local court proceedings which Tamer believed would assist him in securing a license in Nevada.

A special Grand Jury sought to return an indictment against Mr. Leonard which was not signed by the United States Attorney. Chief Judge Kennedy who conducted the *in camera* proceeding, wrote an opinion ordering the files sealed. The trial judge ordered that the defendants who had not participated in the *in camera* proceedings be given access to them.

The government had issued a subpoena for the testimony of Mr. Leonard but obtained a stipulation from all defense counsel which obviated the necessity for its production.

We find no abuse of discretion on the part of the trial judge nor any prejudice to Abraham and Monazym (See Opinion Denying Post Trial Motions, (App. 456)), nor was there any abuse of discretion in denying the motions for a severance or Tamer's motion to suppress evidence.

## VIII

Appellant Monazym challenges the sufficiency of the evidence to support his conviction by the jury. The evidence is detailed by the District Judge in his Opinion Denying Post Trial Motions. (App. 449, 450). The evidence and the inferences to be reasonably drawn therefrom must be viewed in the most favorable light in favor of the government. *Glass* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Dye*, 508 F. 2d 1226 (6th Cir. 1974); *United States* v. *Green*, 548 F. 2d 1261 (6th Cir. 1977). So viewed, we are of the opinion that the verdict of the jury is supported by

abundant evidence. In our opinion, the indictment charged only a single conspiracy.

## IX

Aladdin contends that the district court erred in denying its motion for a severance. It alleges that it could not defend itself except through the testimony of its alleged agents, who, as defendants in this joint trial, had countervailing Fifth Amendment rights not to testify.

The trouble with this argument is that the proof at the trial showed that conspiratorial acts were committed by at least six other officers, agents and employees of Aladdin who were not defendants. Aladdin did not call any of them to testify in its behalf. No showing was made by Aladdin that any of its officers, agents or employees were willing to testify in its behalf or exculpate it. There was no showing that in separate trials any defendant would waive his Fifth Amendment privilege.

This matter was addressed entirely to the sound discretion of the district court. Aladdin had a heavy burden to overcome which it was unable to do. *Cf. United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977).

## Conclusion

The judgments of conviction are affirmed.

**APPENDIX B**

UNITED STATES DISTRICT COURT,
E. D. MICHIGAN, S. D.

Crim. A. No. 8-80572.

Jan. 2, 1979.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES B. GOLDFARB, JAMES TAMER, EDWARD MONAZYM, JAMES ABRAHAM, and ALADDIN HOTEL CORPORATION, *Defendants*.

**Opinion Denying Defendant Goldfarb's First Motion to Dismiss Indictment (16)**

FEIKENS, District Judge.

Several individuals and the Aladdin Hotel Corporation were indicted in August of 1978 on one count of violating 18 U.S.C. § 371 (conspiracy), 19 counts of violating 18 U.S.C. § 1952 ("Travel Act"), and two counts involving 18 U.S.C. § 1962 ("RICO").

The indictment charges that between December of 1976 and March of 1977 the defendants used interstate telephone lines to own and operate the Aladdin Hotel & Casino without having procured licenses required under Nevada law.

*Relevant Statutes and Regulations*

Under Nevada law it is unlawful for any person either as an owner or employee to operate or maintain any gambling establishment without first procuring and thereafter maintaining all permits and/or licenses which the state or local government may require. Nev.Rev.Stat. § 463.160.1(a)

Two other sections define exactly who must possess a license. Under Nev.Rev.Stat. § 463.530 certain "key employees" of gaming *licensees* (such as the Aladdin) may be required to apply for licenses before the Nevada Gaming Commission if in the Commission's opinion the public interest will thereby be served. The Commission learns who it should require to submit to licensure scrutiny by requiring an annual report from each licensee identifying every individual directly or indirectly engaged in the administration or supervision of the gaming operations. Certain employees are presumptively so engaged. They are, any individual who: may approve or extend gaming credit or whose recommendations in this respect are ordinarily followed; supervises or directs or who has the authority to supervise or direct a gaming shift; may approve or extend complimentary house services; supervises those who control gaming assets or records; and, anyone who helps to formulate management policy. Nevada Gaming Commission and State Gaming Control Board Regulation 3.100.1(b), (d), (f), (g) & (i).

Regulation 3.110.1 defines any employee or agent having significant influence over the licensee's operations or who is listed in the annual report as a "key employee" who may be required to submit for licensure. Regulation 3.110.2 sets forth the criteria upon which the Commission decides which key employees must be licensed. Regulation 8.060 provides that no one who proposes to acquire an interest in a gaming operation shall take any part in the management thereof during the pendency of his application for licensing.

Under Nev.Rev.Stat. § 463.335 persons defined as "gaming employees" may not be employed unless they hold all work permits required by the city or county in which the work is performed. Persons empowered to extend credit or complimentary services are considered "gaming employees." Nev.Rev.Stat. § 463.335.1.

The penalty provision of the Gaming Control Act provides:

> The violation of any of the provisions of this chapter, the penalty for which is not herein specifically fixed, is a gross misdemeanor. Nev.Rev.Stat. §463.360.

The relevant federal statute is 18 U.S.C. § 1952 (Travel Act) which provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail with intent to—
>
> • • • • • • • • • • •
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means any business enterprise involving *gambling* . . . in violation of the laws of the State in which they are committed or of the United States . . . . [emphasis added]

The government's theory appears to be that Tamer, one of the defendants and the Entertainment Director at the Aladdin, maintained such influence there that he would have been required to hold a license under Nevada law had the extent of his control been known to the Nevada gaming authorities; that he concealed that control; that he was not so licensed and thus violated § 463.160(1). Secondly, the government alleges that Goldfarb maintained a hidden interest in the Aladdin, exercising such control over its activities that had his interest been disclosed, he, too, would have been required to submit to licensure and hold a license under either § 463.160 or § 463.335; that he did not so sub-

contains the necessary specificity.

mit nor was he licensed. The government claims that the other defendants conspired and acted to aid and facilitate this unlawful conduct, were inextricably bound up in what amounted to an illegal business enterprise to violate the Nevada gaming laws, and that they used interstate telephone lines to commit those violations.

As factual background, in 1971 Goldfarb applied for permission to become an incorporator of the Aladdin under a Nevada statute which at that time so provided. His application was denied. Subsequently, he applied for licensure as a shareholder, but protested a "waiver of rights" form that was required as a part of the application. The result was that the Nevada Gaming Control Board failed to process the application until in June of 1974 a suit was instituted in the 8th Judicial District of Nevada, the district which includes Las Vegas. In June of 1978 the suit was dismissed without prejudice when the Board agreed to withdraw the waiver. At no time relevant to these proceedings was Goldfarb licensed either to be employed by, own or manage the Aladdin. Tamer held a permit to be employed as the Entertainment Director of the Aladdin but is not licensed to otherwise participate in its management.

Defendants move the indictment be dismissed because the Nevada Gaming Control Act is unconstitutional.

*The Defendants' Theory*

The Nevada Gaming Control Act has been definitively construed by the Nevada Supreme Court as setting forth a scheme in which gaming is viewed

> as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution. Within this context we find no room for federally protected constitutional rights. This distinctively state problem is to be governed, controlled and regulated by the state legislature and, to the extent the

> legislature decrees, by the Nevada Constitution. It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited. [footnotes omitted]

*State* v. *Rosenthal,* 599 P.2d 830, 836 (Nev. 1977). However, the court distinguishes between applicants and licensees.

> A reasonable distinction exists between the status of one who seeks to acquire a license, and the status of one who possesses a work permit as a gaming employee. The former does not have existing privileges, but is attempting to acquire them. The latter does have an existing privilege, and is entitled to receive notice and a hearing before his privilege to work as a gaming employee can be nullified.

*Id.,* at 837.

Goldfarb claims that Rosenthal, as the pronouncement of the court of last resort in Nevada, binds this court, citing, *inter alia, Quong Ham Wash v. Industrial Accident Commission,* 255 U.S. 445, 41 S.Ct. 373, 65 L.Ed. 723 (1921); *Truax v. Corrigan,* 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921) and *United States v. Twelve Two Hundred Foot Reels,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); and that the *Rosenthal* case is, with the statute it construes, a unitary piece of law, the case and statute are inseparable.

Goldfarb next contends that one in his position—that of a license applicant—has certain constitutional rights which may not be so cavalierly abridged. He emphasizes the interpretation of the due process which holds that "the touchstone of due process is protection . . . against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), and notes that due process protections are not dependent upon

whether the interest at issue is characterized as a right or a privilege.[1] *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

Goldfarb claims that the right to engage in a lawful occupation is a "fundamental one" whose denial should be attended by due process protections. *New State Ice Company v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932); *Hampton v. Mow Sum Wong*, 426 U.S. 88, 102, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). More specifically, Goldfarb characterizes it as either an interest in "property", as defined in *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (protected interests are claims to a benefit to which the holder has "more than an abstract need or desire . . . more than a unilateral expectation . . . [but] instead . . . a legitimate claim of entitlement . . .") and *Perry v. Sundermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), or in "liberty" under either the interpretation which describes government actions which foreclose a range of opportunity as implicating protected interests, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1967) (denial of admission to the practice of law); *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926) (denial of accountant's right to practice before the Board of Tax Appeals); or the interpretation explained in *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

Goldfarb concludes that because the Nevada Gaming Control Act has been construed in a manner violative of his

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[1] Nev.Rev.Stat. § 463.130(2) states:

> Any license issued pursuant to this chapter shall be deemed to be a revocable privilege and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder.

and other license applicants' constitutional rights it is unconstitutional and, therefore void. As a logical concomitant, he believes there can be no prosecution under the Travel Act.

**Findings and Conclusions**

I cannot agree that I am bound by the Nevada Supreme Court's pronouncements in *Rosenthal* with respect to the Gaming Act. The *Rosenthal* decision is not inextricably bound to that statute.

There are many cases which say that a state court's construction of its own statute is conclusive upon federal courts. See, for example, *Quong Ham Wah v. Industrial Accident Commission, supra,* 255 U.S. at 448, 41 S.Ct. at 374, where the Court states:

> It is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state.

However, the crucial distinction between that situation and the instant one is that in *Quong Ham* the question involved the substance of state law.

Here, we are concerned with a question of federal law; namely, the existence or non-existence of a Travel Act violation. I am not directly concerned with the content of the Nevada gaming law. The Travel Act is violated when acts illegal in Nevada are performed. The content of state law is a state matter under *Quong Ham;* but that does not mean that I am bound by Nevada's pronouncements as to the constitutional ramifications of that content.[2]

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[2] To further illustrate this distinction, consider a situation in which it is claimed that a statutory scheme is unconstitutional because it fails to provide sufficient judicial review of an administrative body's determination. The nature and extent of the judicial

Defendants maintain that the operative distinction in this case is between situations where the federal court is *applying* state law and those in which the federal court is *interpreting* state law (page 3 of Defendant's Supplemental Memorandum); the former situation being the one in which the federal court is "bound". I agree. Defendants err in characterizing this case as one in which I am *applying* state law. Due to the overriding federal purpose served by the Travel Act, *I must interpret all of the laws implicated by this prosecution,* including Nevada law. I am, therefore, not bound by the *Rosenthal* decision, whatever its constitutional merits or infirmities.

The case of *Angel v. Bullington,* 330 U.S. 183, 189, 67 S. Ct. 657, 91 L.Ed. 832 (1947) illustrates this principle. *Angel* was a diversity suit in which the Court acknowledged that North Carolina's construction of a jurisdictional statute was binding insofar as the state court had determined the statute's meaning and application to the suit's parties. The statute operated to bar the plaintiff's claim. He argued that, as such, it constituted an unconstitutional limitation on the state court's jurisdiction. The defendant responded that the state court had found no violation and that this was a matter upon which the state court's conclusion was preclusive. The Supreme Court disagreed and explained "[w]hen an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide." *Id.,* at 189, 67 S.Ct. at 660. Elaborating, the Court stated:

> . . . where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, *the limitations upon the courts of a State do not control a federal court sitting in the*

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review available would be a question of state law. However, the effect severely restricted judicial review would have on the statute's constitutionality would not be a state but federal question. In the latter, what the state court says is not binding on a federal court.

*state. Holmberg v. Armbrecht,* 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743. *Id.,* at 192, 67 S.Ct. at 662. [emphasis supplied]

I believe the instant case is analogous to *Angel.* The federal court is the forum here because federally created rights and liabilities are at issue. The Travel Act implements a federal solution to a federal problem.

This principle was dealt with perhaps more perceptively in P. Mishkin, "The Variousness of Federal Law: Competence and Discretion in the Choice of National and State Rules for Decision," 105 U.Pa.L.Rev. 797 (1957) (hereinafter "Mishkin").[3]

The author observes that state enactments are not self sufficient for all purposes. The federal judiciary is empowered to declare the governing law in areas that are substantially related to a program of national governmental operation. *Id.,* at 800. The Travel Act's legislative history demonstrates clearly its purpose to combat a problem of uniquely national scope: organized racketeering and crime. *United States v. Nardello,* 393 U.S. 286, 292, 89 S.Ct. 534, 21 L.Ed.2d 487 (1959); *Rewis v. United States,* 401 U.S. 808, 811, & n. 6, 91 1056, 28 L.Ed.2d 493 (1970). The Travel Act, in effect, implements such a program. Therefore, this is a suitable case for Mishkin's principle.

As Professor Mishkin observes, the clear implication of the *Clearfield*[4] doctrine is that any issue bearing a substantial relationship to an established national governmental function should be determined by reference to federal law. The constitutionality of the Gaming Control Act is a federal question.

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[3] Although this article deals with choice of law in the civil context, I think it deals with concepts so fundamental to our federalism that they transcend the civil-criminal distinction.

[4] *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

I become more firmly convinced of this conclusion when I view the issue as federal incorporation of state law by reference. That is, the Travel Act incorporates Nevada state law in the area of gambling. Considered thus, even more latitude inheres in the federal judiciary. For example, in *F.R.C. v. Beaver County,* 328 U.S. 204, 208-9, 66 S.Ct. 992, 90 L.Ed. 1172 (1946), a federal statute granted an exception to the R.F.C.'s tax immunity. It allowed the state to tax "real property." The question was whether a state or federal definition of "real property" would apply in deciding whether certain federally owned machinery was taxable under a state law which taxed such fixtures as realty. The Court rejected the government's assertion that a more universally accepted definition of realty must obtain, but noted that this was true *only* because the state definition did not impair the purposes of the Act nor work a discrimination against the government.

To saddle the federal government with the state's interpretation would allow the states to eviscerate the Travel Act and frustrate a federal solution to a problem of national scope. As Mishkin notes:

> The extent of incorporation and the techniques for ascertaining what local law is *must be determined by the particular considerations which established the advisability of adopting that law.* Mishkin, at 803. [emphasis added]

It would be self-defeating for the federal government to adopt state notions of illegality only to be bound by state courts which may have considered the law in circumstances which do not present the purposes and considerations surrounding the federal enactment. Such self-defeating intent should not be presumed and will not be found.

The Supreme Court has given the Travel Act this kind of preferential treatment. In *United States v. Nardello, supra,* the District Court dismissed a § 1952 indictment on the grounds that the conduct alleged was not technically

extortion in Pennsylvania, the relevant state. The Supreme Court reversed. Because the Travel Act's aim is to combat organized crime operating across state lines, the Act must be construed to equal the task. The Court declined to be bound by the state's definition; it would have nullified the Act. Instead, the Court applied a broader definition of illegal extortion, emphasizing that the essential question is whether the type of activity under prosecution is generally or usually of a type subject to criminal sanctions. *Nardello, supra,* 393 U.S. at 293-6, 89 S.Ct. 534; see, *United States v. Polizzi,* 500 F.2d 856, 873 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975); *United States v. Prince,* 515 F.2d 564 (5th Cir. 1975), *cert. denied, sub nom., Craft, aka Woods, et al. v. United States,* 423 U.S. 1032, 96 S.Ct. 563, 46 L.Ed.2d 406 (1975).

The distinction between the view defendants proffer and the approach I adopt is the distinction between applying state law for reasons of state-federal comity and interpreting it to effectuate a far-ranging federal program.

The next question is whether there *are* federal rights implicated when one applies for a Nevada gaming license, and whether without *Rosenthal* the statute abridges them.

The defendants claim first that the right to enter a lawful business is so fundamental its denial should comply with due process. *Cafeteria Workers v. McElroy, supra,* (dealt with plaintiff's right to a due process hearing upon revocation of a security clearance necessary to work at a governmental installation);[5] *Hampton v. Mow Sun Wong, supra,* 426 U.S. at 102, 96 S.Ct. 1895.

This interpretation of "liberty interests" is expounded by Justice Marshall, dissenting in *Massachusetts v. Murgia,* 427 U.S. 307, 322-3, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

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[5] The Court held in the negative, finding the plaintiff was free to look elsewhere for employment and that merely foreclosing one small field of employment did not implicate liberty.

However, this view has not received the approval of a majority of the Supreme Court which has limited the scope of Fourteenth Amendment protection in this regard to cases where the foreclosure of opportunities is considerably greater than here. As the Court stated in *Board of Regents v. Roth, supra,* 408 U.S. at 575, 92 S.Ct. at 2708:

> It stretches the concept of liberty too far to suggest that a person is deprived of 'liberty' when [one] simply is not rehired in one job but remains as free as before to seek another.

The defendant Goldfarb is a man of substantial means and abilities. He has numerous opportunities for a variety of occupations before him. The Nevada Gaming Commission's denial was hardly of the magnitude required to trigger the Fourteenth Amendment.[6]

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[6] The defendant also cites a number of cases which deal with constitutional deprivations which occur when applicants are denied admission to professions. For example, in *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) the Supreme Court held that the New Mexico Board of Bar Examiners had wrongfully denied Schware a license to practice law allegedly because of former communist party affiliations. The Court found a due process violation, not in the abstract nor because of any protected liberty or property interest, but because the criteria applied by the Board were not rationally related to the ends to be served by them and because the criteria impinged upon protected First Amendment rights. No mention of a liberty or property interest in practicing law was made. Therefore, whatever these cases say about entrance requirements and substantive due process, they do not address the question at hand. Moreover, I think that the "legitimate claim of entitlement" of one in the plaintiff Schware's position is considerably stronger than Goldfarb's, if indeed Goldfarb can be said to have any claim at all in this regard. I think that the other cases defendant cites in this vein may be similarly distinguished. See *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 123, 46 S.Ct. 215, 70 L.Ed. 494 (1926); *Shaw v. Hospital Authority,* 507 F.2d 625 (5th Cir. 1975); *Don v. Okmulgee Memorial Hospital,* 443 F.2d 234 (10th Cir. 1971).

More troublesome is *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). There, an unsuccessful liquor license applicant claimed she met all the requirements for a license yet was denied arbitrarily, without a statement of reasons. Noting that merely calling a liquor license a privilege does not exempt the state from the Fourteenth Amendment in its dealings with license applicants, the court held that one who satisfies the requirements for a license is entitled to a due process hearing upon denial thereof. On its face, it seems that *Hornsby* is support for Goldfarb's position although he has not, as yet, shown he meets the requirements for a gaming license (nor does it seem that he could, given the subjective and complex criteria applied by the Nevada state agencies). *Id.*, at 610. However, in *Atlanta v. Allen*, 389 F.2d 713 (5th Cir. 1968), the Fifth Circuit reconsidered *Hornsby* and stated that where the state sets forth specific criteria upon which the decision to grant a license will be based, there arises a due process right to have the agencies act only upon those criteria. The court emphasized it does not sit as a super-Liquor Control Board. There has been no showing here that Nevada authorities did not act upon their published criteria, nor do I sit to review their decision.

I have recently reviewed the *Hornsby* line in connection with a Michigan liquor license applicant's suit charging that the City of Pontiac acted arbitrarily in denying a liquor license. *Shamie v. City of Pontiac*, 443 F.Supp. 679, 684 (E.D.Mich.1977). I held there that the *Hornsby* case should not be followed, reasoning that liquor license applicants have no claim of entitlement under *Roth*. See *Lewis v. City of Grand Rapids*, 356 F.2d 276, 285-6 (6th Cir. 1966); *Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976), *cert. denied*, 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 177 (1976).[7]

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[7] I do not believe the Supreme Court's mention of *Hornsby* in *Goldberg v. Kelly*, 397 U.S. 254, 296 n.9, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) as an example of a situation in which courts had

Moreover, Nevada has gone to great lengths to deny the kind of claim of entitlement to a gaming license that *Roth* requires of one claiming a protected property interest. Nev.Rev.Stat. § 463.140(2) provides, "The commission shall have full and absolute power and authority to deny any application or to limit, condition, restrict, revoke or suspend any license." Regulation 4.010.1 provides:

> Any gaming license . . . shall be deemed to be a revocable privilege and no person holding such a license . . . is deemed to have acquired any vested rights therein.[8]

Without deciding the validity of such statutes and regulations, they are nonetheless excellent evidence of the status of a gaming license under Nevada law and practice. They make explicit no applicant should *expect* a license. Property rights—legitimate claims of entitlement—are within the state's authority to create or deny. For example, in *Bishop v. Wood*, 426 U.S. 341, 345, 96 S.Ct. 2074, 2077, 48 L.Ed2d 684 (1975), the Supreme Court held that the existence of "an enforceable expectation of continued public employment," a property right, was to be determined by whether under state law or custom such an interest existed. Nevada has explicitly disclaimed the interest claimed; its determination is conclusive. For these reasons, I find the

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abjured the ancient notion of property interests as rights in a tangible thing amounts to a tacit approval of that case, as Goldfarb contends.

[8] Regulation 4.010.2 provides

> An applicant for a state gaming license is seeking the granting of a privilege, and the burden of proving his qualification to receive any license is at all times on the applicant. An applicant must accept any risk of adverse public notice, embarrassment, criticism, or other action or financial loss which may result from action with respect to an application and expressly waive any claim for damages as a result thereof.

Nevada statutes under attack are constitutional. The indictment will not be dismissed on this ground.

However, I also find that even assuming the unconstitutionality of the Nevada statutes in question, the defendants' claim must fail.

The overriding federal nature of the Travel Act dictates that an offense thereunder is primarily federal in nature. *United States v. Polizzi, supra,* 500 F.2d at 869 (9th Cir. 1974); *United States v. Prince,* 529 F.2d 1108, 1111-2 (6th Cir. 1976), *cert. denied,* 429 U.S. 838, 97 S.Ct. 108, 50 L.Ed. 2d 105 (1976). The gravamen of the offense is the interstate nexus itself. *Polizzi, supra,* at 869. In § 1952 cases the state law serves merely a definitional purpose—there is no need to prove a violation of state law as an essential element of the federal crime. *United States v. Prince,* 515 F.2d 564, 566 (5th Cir. 1975); *United States v. Nardello, supra; United States v. Conway,* 507 F.2d 1047, 1051 (5th Cir. 1975); *but see United States v. Brown,* 505 F.2d 261, 262-3 (4th Cir. 1974). Thus, I do not think the unconstitutionality of the underlying state statute would necessarily be a defense to prosecution under § 1952.

One case has dealt with this question. *United States v. Hiatt,* 527 F.2d 1048 (9th Cir. 1975). There the defendant in a Travel Act prosecution argued that the underlying Alaska prostitution statute was unconstitutional as a denial of equal protection to women and, therefore, he could not be prosecuted. The court stated:

> The constitutional infirmity asserted against the Alaska statute was that it denied equal protection of laws to females, as enforced. This defense in the absence of a determination that the Alaska statute was void in its entirety, would not be available to males prosecuted for prostitution. Under these circumstances, it is doubtful that Hiatt can utilize this infirmity to defeat prosecution pursuant to the statutes under which he was here convicted. *Id.,* at 1051.

This statement points out, moreover, a crucial feature of a holding of unconstitutionality, had one been secured here. Even if the instant Nevada statute was held violative of the defendants' due process rights, either on its face or in operation, it would not necessarily result in a defense to § 1952. The alleged unconstitutional aspect of the statute has no relationship to the defendant's rights in his posture as a criminal defendant. The statute, in some respects, may be viewed as severable. That is, an improper infringement of a license applicant's due process rights may yet retain sufficient vitality in its criminal prohibitory effect to support a prosecution under the Travel Act, especially given the overriding federal nature of a Travel Act prosecution.

To illustrate, consider a prosecution for violating an obscenity law. If the law is held unconstitutional as an infringement of the defendant's First Amendment rights, that would constitute a defense to the prosecution. Once the unconstitutional portion of the statute is stricken, the statute retains no prohibitory vitality. This is essentially the situation presented in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Reverend Shuttlesworth was prosecuted for violating an anti-parade ordinance. It was a direct prohibition of his First Amendment rights. Holding the law unconstitutional thus removed the offense completely. Holding the Nevada statutes attacked here unconstitutional in the license-applicant context would not so remove the offense.[9]

In this case, the alleged unconstitutionality of the Nevada law does not directly concern the defendants' asserted right to engage in gambling activities. It does not proscribe conduct protected under the Constitution. The alleged infirmity is incidental to the defendants' rights. This is a difficult

[9] Consider also *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), where the unconstitutionality of a zoning law on Ninth Amendment and substantive due process grounds precluded conviction thereunder.

distinction to draw because the rubric "due process" is applied to rights that surface in both civil and criminal contexts. However, the due process rights that apply in the license denial context are distinct from the due process rights which obtain in a criminal context. The fact that Goldfarb may have a 42 U.S.C. § 1983 action against Nevada does not necessarily confer immunity from prosecution.

This conclusion points out that Goldfarb should have tested the constitutionality of the regulation or statute in question before he embarked on a course of violating it—if he did indeed violate it. *See generally*: *McGee v. United States*, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971); *McKart v. United States*, 395 U.S. 185, 197-202, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Falbo v. United States*, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305 (1943); *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946); *Mulloy v. United States*, 398 U.S. 410, 416, 90 S.Ct. 1766, 26 L.Ed.2d 362 (1970); *Witmer v. United States*, 348 U.S. 375, 380-1, 75 S.Ct. 392, 99 L.Ed. 428 (1955).

The defendants stress the absence of a forum in which to *appeal* the Commission's denial. Assuming, *arguendo*, that this is true, there was nonetheless a judicial forum to *challenge the validity* of the denial. Goldfarb availed himself of it when he filed suit in the 8th Judicial District. If Goldfarb thought the regulations or procedures were faulty, the suits should have been continued to its conclusion. The cases of *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52, 56 S.Ct. 720, 80 L.Ed. 1023 (1936) and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289, 40 S.Ct. 527, 64 L.Ed. 908 (1919) are distinguishable because at stake there were protected constitutional interests.

Having considered defendants' other claims, I find them without merit. The motion to dismiss the indictment is hereby denied.

**APPENDIX C**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action: 8-80572

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES GOLDFARB, et al., *Defendants*.

**Opinion Denying Motion To Dismiss**
**#10**

The instant motion to dismiss the indictment proceeds on three theories.

I. The Travel Act (18 U.S.C. § 1952) makes it unlawful to use any interstate facility to "promote, manage, establish or carry on . . . any unlawful activity." 18 U.S.C. § 1952 (a)(3). "Unlawful activity" is defined as "any business enterprise involving gambling . . . offenses in violation of the laws of the state in which they are committed . . . ." 18 U.S.C. § 1952 (b)(1).

The indictment charges that the defendants participated in the ownership and management of the Aladdin Hotel and Casino without licenses required by Nevada law. The defendants claim that because the Aladdin is a lawful business in Nevada, there can be no violation of the Travel Act; only where the business that the defendant is alleged to have operated is wholly illegal under state law is the Travel Act violated. Merely operating a lawful business in violation of state regulations thereof, they claim, is not conduct at which the Travel Act is aimed. In support of this claim the legislative history is invoked.

The crucial question is whether the phrase "business enterprise" is confined to businesses wholly illegal under Nevada law or has a broader meaning, namely, a course of conduct designed to violate the law. The latter interpretation is correct.

In the hearings before the House and Senate Judiciary Committees (*Legislation Relating to Organized Crime: Hearings on H.R. 468 et al., Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 87th Cong., 1st Sess. (1961) (hereinafter "House Hearings") and *Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653 et al., Before the Senate Comm. on the Judiciary,* 87th Cong., 1st Sess. (1961) (hereinafter "Senate Hearings"), the phrase "business enterprise" was explained to mean "a continuous course of conduct sufficient for it to be termed a business enterprise." Statement of Attorney General Robert F. Kennedy at the Senate Hearings. The House Report (H.Rep. No. 966, 87th Cong., 1st Sess. (1961), *reprinted* in (1961) U.S. Code Cong. & Ad. News 2664, 2666) states:

> The use of the term "business enterprise" requires that the activity be a continuous course of conduct. Thus, individual or isolated violations would not come within the scope of this bill since they do not constitute a continuous course of conduct so as to be a business enterprise.

Likewise, when Deputy Attorney General Herbert Miller explained the Travel Act to the House Judiciary Committee he stated:

> The use of the term "business enterprise" limits the application of this section to a continuous and organized course of conduct in these activities .... House Hearings at 336.

The legislative history is not unambiguous, however. On two occasions Chairman Celler of the House Judiciary Committee posed a hypothetical question in which an individual crossed state lines with the intent to operate a liquor store after legal hours and did thereafter so operate it. Before the House Committee, Attorney General Kennedy stated that in his opinion the Act would not be violated. Chairman Celler, however, thought it would be. House Hearings at 36. *See also* House Hearings at 146.

Moreover, on numerous occasions, the exact problem at hand was brought to the legislature's attention. Professor Louis B. Schwartz stated that in his opinion the Act applied to

> Combinations of lawful and unlawful activities (and) . . . applies even to travel to promote lawful aspects of a business which involves "unlawful" activities . . . House Hearings at 50.

Professor Schwartz thought that the Act "would cover a vast range of regulations, violation of which entails only fines or very limited imprisonment under state law." *Id.* And similarly, several other commentators brought this problem to the Committee's attention. House Hearings at 75 (statement of Professor Herbert Wechsler); *Id.*, at 162 (statement of Richard A. Green); *Id.*, at 173-175 (statement of Martin M. Nelson). These people unanimously thought that the fact that the Act would prohibit such conduct was a deficiency; the proposed legislation was too broad. Therefore, the Congress was aware of the wide scope of the Travel Act and passed it anyway. Had Congress desired to narrow the Act, it would have done so.

The defendant, however, cites testimony before the Committees which points to the narrower reading. Deputy Attorney General Miller told the House Committee that "H.R. 6572 bans unlawful business—not incidental illegal acts

done in the course of legal business." House Hearings at 336. And at House Hearings 341 Miller stated:

> Any business enterprise can have an employee or the president or someone down the line commit some act which is in violation of a statute and therefore, a crime . . . he might be rolling dice in the back room for example, which is a violation of State law. Now, that does not make the business enterprise, itself an unlawful one.

However, this does not necessarily conflict with the notion of a course of conduct to operate the Aladdin without a license being itself, apart from the Aladdin Hotel, an illegal business enterprise. Likewise, the Attorney General's explanation of the bill (H.R. 6572) as being directed at "the business itself as being an illegal business", House Hearings at 342, may be reconciled with the broader interpretation of the phrase "business enterprise" if a course of conduct is considered as the business itself. See Miller, "The Travel Act: A New Statutory Approach to Organized Crime in the United States," 1 Duquesne L. Rev. 181, 194 (1963).

Moreover, the proponents of the narrower reading were equivocal. For example, when Robert F. Kennedy responded to Chairman Celler's liquor store hypothetical, he intimated that where a person habitually crossed state lines to operate his business after hours this *would* be a violation of the Act. House Hearings at 35.

Finally, the testimony cited by defendant was all made to the Congress rather than *by* it or its members. The legislative intent is found in what the Congress intended not in what proponents or opponents believed.[1] Clearly, the

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[1] Simply because the bill's proponents may have painted the Travel Act as a narrower statute in order to speed its passage does not mean that the Act is confined to their interpretation. Congress surely was aware of the potential of the language it passed.

Congress knew the breadth of the proposed legislation yet enacted it notwithstanding.

II. The defendants' second claim relates to the indictment's specificity as to the acts "thereafter performed" in furtherance of the illegal business. 18 U.S.C. § 1952 (a). The indictment states that the defendants "thereafter did perform and attempt to perform (such) acts."

Although an indictment must specifically state the facts of the alleged offense, this indictment is not deficient in that regard. In *United States v. Nichols,* 421 F.2d 570, 573-74 (8th Cir. 1970) the indictment charged that the defendant violated the Travel Act and "thereafter, . . . did perform acts to . . . facilitate the . . . carrying on of said unlawful activity . . . ." The court held that "(the) indictment here meets (the) necessary standards." In *United States v. Levine,* 457 F.2d 1186, 1189 (10th Cir. 1972) the court approved language in a § 1952 indictment which merely "tracked" the statute. In *United States v. Maselli,* 534 F.3d 1197, 1199 (6th Cir. 1976) the court approved an indictment which charged that the defendant "thereafter" . . . did perform and cause to be performed acts to promote, manage. . . ."

The defendants' claim that if the "thereafter acts" are allowed to consist of subsequent telephone calls then the First Amendment is abridged, is clearly without merit. In *United States v. Smith,* 209 F. Supp. 907, 918 (E.D. Ill. 1962) the court stated:

> While the First Amendment provides freedom of speech, it does not guarantee or protect criminal conduct. . . . These statutes do not restrict freedom of speech; they merely prohibit the use of interstate commerce to [sic] certain conduct which the Congress has declared to be illegal.

III. Defendants' third claim is that those counts of the indictment which are premised upon the receipt of a tele-

phone call, rather than the placing, should be dismissed because the mere receipt of a call does not constitute the affirmative use of an interstate facility and thus does not violate the Travel Act. It has no merit. By speaking in response to the call the defendants made the requisite affirmative use of an interstate facility.

For these reasons the motion to dismiss the indictment is denied. An appropriate order may be submitted.

/s/ JOHN FEIKENS
John Feikens
United States District Judge

Date: December 28, 1978,
Detroit, Michigan.

**APPENDIX D**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action: 8-80572

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES GOLDFARB, et al., *Defendants*.

**Opinion: Multiplicity of Travel Act Counts**

This opinion supplements a thorough discussion of this issue which was had on the record on November 30, 1978.

At oral arguments and in the briefs, the defendants raised various issues as to whether there were multiplicitous counts in the indictment. I raised the more specific question as to whether the Travel Act (18 U.S.C. § 1952) counts against each defendant were multiplicitous. That is, do the separate counts, each alleging a single interstate telephone call involving one or more of the defendants, fragment a unitary offense into several. I find the indictment multiplicitous in this respect. Before trial the government must elect one count of § 1952 violation upon which to proceed to the jury against each defendant.

**Discussion**

Multiplicity is the charging of a single offense in several counts. 1 Wright, Federal Practice and Procedure, § 142 (1969). The problem has arisen in a variety of situations involving the relationships between several types of criminal statutes and several different kinds of illegal conduct.

In *Bell v. United States*, 349 U.S. 81 (1955) the defendant transported two women across state lines, in violation

of the Mann Act, on a single journey. The Supreme Court held that only one conviction could be obtained, noting that the punishment appropriate in a federal offense is a matter for the discretion of Congress. The Court stated:

> When Congress has the will it has no difficulty in expressing it— . . . that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. 349 U.S. at 83.

In *Ladner v. United States,* 358 U.S. 169 (1958) the Court held that only one violation of 18 U.S.C. § 254 was committed when the defendant fired a single shotgun blast injuring two federal officers.

In *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218 (1952) the government prosecuted on an indictment which alleged one violation of the minimum wage law for each of six weeks in which it was claimed that the employer had paid sub-standard wages. *Id.,* at 244. The Court held that in this situation only one conviction was proper on the rationale that the offense of paying sub-standard wages was by definition only intended to cover a course of conduct, and, this being so, it would be improper to fragment a single course of conduct into multiple offenses without some clear expression of Congressional intent in that direction.

The common thread between these cases is that each involved a prosecution for several violations of a single statutory section where the conduct engaged in by the defendant was either a single act or a connected series of acts. Cases involving the question of whether a single act may violate several distinct statutory prohibitions, *Gore v. United States,* 357 U.S. 386 (1968), or several closely related statutory provisions, *Prince v. United States,* 352 U.S. 322 (1957), thus are not directly on point. They involve considerations somewhat different than those involved here.

The question here is multiple violations of a single statute by a single or close related sequence of acts.

From the foregoing cases, several propositions emerge. First, the most important consideration in determining multiciplicity is the ascertainment of the appropriate unit of prosecution; the smallest unit of misconduct which Congress intended to merit prosecution. Determining the appropriate unit is a matter of Congress' intent. *Bell, supra,* at 82; *Ladner, supra,* at 178; *Heflin v. United States,* 358 U.S. 415, 419 (1958). See also *United States v. Woods,* 568 F.2d 509, 513 (6th Cir. 1978) and *United States v. Nichols,* 401 F. Supp. 1377 (E. D. Mich. 1977). Secondly, each case of this nature is different and must be resolved with reference to the particular statute and facts involved. Precedent is of little more than illustrative value. *Universal C.I.T. Credit Corp.* *supra,* at 222. Thirdly, doubts as to Congress' intent to [illegible]ltiple acts or consequences multiple violations [illegible]gle act a multiple violation) should be resolved [illegible] the government under the principle of lenity. In *Gore* the Court stated:

> When Congress has not explicitly stated what the unit of offense is, the doubt will be resolved in favor of lenity. 357 U.S. at 391

See also *Ladner, supra,* at 177; *Universal, supra,* at 221. It is only when Congress' intent is clear will multiple violations by a single act be found. Likewise, when the offense at issue is arguably comprised of a series of acts or a course of conduct, then multiple violations will only be found from a course of conduct when Congress' intent is clear.

To illustrate these principles, consider *Gore, supra.* There the Court found that on three separate occasions Congress has enacted penalties for the sale and distribution of narcotics as part of a continuing and progressive strategy to curb illicit narcotics trade by imposing cumu-

lative and overlapping penalties. Therefore, the Court allowed three prosecutions for a single act by the defendant. 357 U.S. at 390. But in *Heflin, supra,* the Court found that in enacting two statutes which could cover the same conduct, Congress was merely trying to fill gaps in the law and reach new groups of offenders rather than increase the penalties for the conduct at issue. Thus, the Court did not allow prosecution for both taking and possessing stolen property. 18 U.S.C. § 2113 (c) and (d).

In this case, the government claims that each of some nineteen interstate telephone calls is a separate Travel Act violation, emphasizing that it is the travel itself which is prohibited and, thus each separate call must be a separate violation.

I disagree. The legislative history of the Travel Act, as exhaustively discussed in the opinion on Motion No. 10 (motion to dismiss based on the claim that the Act was directed only at unlawful activities conducted as businesses rather than at courses of conduct in violation of law) is clear that the Travel Act was designed to reach illegal courses of conduct only and that isolated instances of violation of state law were not within its ambit. Although a single act of travel will suffice to support a violation, it is clear that the illegal conduct at which the Act was aimed was a continuous course of activity. The evil at which the Act was directed was organized activity, not the use of interstate facilities. Thus, the travel provides the federal nexus but is not the essence of the offense.

This analysis demonstrates where the court in *United States v. Polizzi,* 500 F. 2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975) errs in its analysis. *Polizzi* conceived that the essence of the offense is travel while I believe it to be business enterprise itself, with the federal nexus only ancillary. The case of *United States v. Teemer,* 214 F. Supp. 952, 958 (N.D. W. Va. 1963) is likewise in error on this issue.

Several other factors weigh in my decision. The purpose of the Act is to supplement the efforts of local law enforcement authorities. This aim may be accomplished without the dubious device of making each separate telephone call a separate offense. In addition, the legislative history indicates grave concern on the part of Congress with respect to the Act's wide scope. To allow this already broad statute to support the multiple counts presented in this indictment would be contrary to those concerns.

The case of *United States v. Woods*, 568 F. 2d 509 (6th Cir. 1978) is particularly instructive in this regard. There the defendant was convicted of three counts of violating a narcotics possession statute based on his possession of a drug at the same time but at three separate locations. The court held that the counts charging the separate possessions were multiplicitous, reasoning that the relevant statute's legislative history did not indicate a Congressional intent to make the possession of drugs kept separately packaged and stored more than one offense. The analogy between the separate packages of drugs and the separate telephone calls at issue here is clear.

The *Woods* case also voiced two other considerations which are relevant to this prosecution. First, the court reasoned that where sufficient penalties for the offense charged are available under conviction on one count, multiple counts are not indicated. *Id.*, at 515. Where the purpose of the statute will be served as well by one count as by many, this purpose, when found, weighs against multiple counts. In this connection the government's concessions that each defendant may be punished only through a unitary sentence is relevant. Here, the purpose of the Travel Act is to enable federal law enforcement to bear upon illegal businesses operated across state lines. This purpose is as well served by one count as many. Second, the Supreme Court has expressed the belief that where multiple counts expose a defendant to punishment out of proportion

to the crime, they should not be allowed. *Ladner, supra* at 177.

In concluding that the Travel Act counts are multiplicitous, I reach a result which is directly contrary to *United States v. Polizzi, supra,* and *United States v. Teemer, supra.* However, scrutiny of the legislative history of the Act compels my conclusion. I find no evidence to suggest that Congress was interested in making criminal each telephone call across state lines. Considering the Act's focus on a course of conduct as the real evil, Congress would have indicated more clearly its intent to punish separate acts of travel had it so desired. The language of the statute is ambiguous and thus the balance must tip in favor of the defendants.

A necessary result of the conclusion that the Travel Act counts are multiplicitous is that the RICO counts 21 and 22, involving 18 U.S.C. § 1962 (b) and (c), must be dismissed.

The government must, therefore, elect among counts 1—8 and 14—19 as to defendant Goldfarb; among counts 1—4, 8, 11, 13 and 15 as to defendant Abraham; and, among counts 5, 9—13, 18 and 19 as to defendant Tamer. Count 14 against defendant Monazym is allowed to stand. If not elected as to Goldfarb, it must be dismissed as to him.

An appropriate order is entered herewith.

/s/ John Feikens
United States District Judge

Date: December —, 1978,
Detroit, Michigan.

**APPENDIX E**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action: 8-80572

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES GOLDFARB, et al., *Defendants*.

**Opinion Denying Post-Trial Motions**

(Filed June 18, 1979)

Defendants Charles Goldfarb, James Tamer, James Abraham, Edward Monazym and the Aladdin Hotel Corporation were convicted by a jury of conspiring to violate 18 U.S.C. § 1952, in violation of 18 U.S.C. § 371. Goldfarb, Abraham and the Aladdin were convicted also of violating 18 U.S.C. § 1952. Tamer was acquitted of a similar charge.

These convictions arose from Defendants Goldfarb and Tamer's hidden operation of the Aladdin Hotel and Casino in Las Vegas, Nevada through the use of interstate telephone lines between Detroit and Las Vegas. Goldfarb was charged with concealing his true role there from Nevada authorities. Abraham was both a co-conspirator and an accomplice to Goldfarb's crime. Monazym was a co-conspirator.

Each Defendant now moves for some or all of the following relief: (1) a judgment of acquittal (Rule 29(c) F.R. Crim.P.); (2) a new trial (Rule 33); (3) arrest of judgment (Rule 34); and (4) a judgment of acquittal subsequent to the taking of all proofs (Rule 29(b)). Pursuant to the policy I instituted at the inception of this case, any motion by one of the Defendants is, if applicable, a motion by all.

Each Defendant has also filed written objections to the jury charge. These objections were all raised before the charge was delivered, either on the record in court or by written requests, and all may be taken to have been denied. I will not review them further at this point. (*See* Tr. 4006-7)

Rather than to attempt to treat these motions by subject matter, they are dealt with by reference to the Defendant on whose behalf they are made. This is because there is overlap as to the points raised, and one asserted error might form the basis for several types of relief.

**Defendant Goldfarb**

Goldfarb's motion does not purport to raise new issues. Rather, it urges a review of several adverse rulings made before and during the trial.

The first claim is that neither of the two Nevada statutes, Nev. Rev. Stat. §§ 463.160.1(a) and 463.335, referred to in the indictment describe any offense which encompasses the conduct in which Defendants were alleged to have engaged. In Goldfarb's motion, this argument has two parts. Section 463.335.3 prohibits one from being a "gaming employee" unless he is the holder of a valid work permit issued in accordance with the applicable local ordinances or regulations, or, if none is required thereunder, by the Gaming Control Board. The statute enumerates a number of occupations, the practitioners of which are "gaming employees." Citing the principle of *ejusdem generis* Goldfarb argues that the conduct he is alleged (or proved) to have engaged in does not fall within the ambit of the phrase "gaming employee." He argues the thrust of the government's allegations and proofs was control and ownership, not employment, or at least not employment in the low-level sense which the statute seems to contemplate.

The second aspect of Goldfarb's motion is that though § 463.160 makes it unlawful for anyone to operate or conduct any gambling operation without first having procured and thereafter maintained all gaming licenses as required by statute or ordinance, he was not a "person required to be licensed," even if all the government claims about his conduct are true. He argues that a § 463.335 work permit is not a "license" under § 463.160.1; therefore, failure to have it is not criminal. He also claims that there is no *statute* that requires one in his position to be licensed, and that the licensing requirement in cases like his is, if it exists at all, purely an administrative one. And, even if an administrative requirement that one must hold a license would render it criminal thereafter to operate a casino without it, Goldfarb contends that such a requirement was never made applicable as to him; he says that the closest the Nevada Gaming Commission came to such a requirement was its denial of the license § 463.530 mandated him to have if he was to be an officer of the Aladdin. (In 1971 Goldfarb applied to be licensed as the putative Secretary-Treasurer of the Aladdin. He was denied that license because of "unsuitable associations.")

An extended response to this argument is not appropriate. My interpretation of the Nevada gaming laws, with my explanation of what acts constitute crimes under Nevada law, is set forth fully in my charge to the jury. [Tr. 3978-3983] It is sufficient to say that I find § 463.335 broad enough to encompass Goldfarb's conduct. I rely especially upon the phrase: "connected directly with the operation of a nonrestricted establishment, and includes without limitation . . ." contained in § 463.335.1(a). Additionally, with respect to § 463.160.1(a), I hold that if a person applies for a license under § 463.530 as an owner or officer and is denied such a license (for whatever reason) and continues thereafter to exert significant influence and control over the operations of a casino, that person is in violation of § 463.160.1(a). Such a person is "required to be

licensed" within the meaning of that section and is one who is "dealing, operating, etc." a gaming operation without "first having procured and thereafter maintaining" the license he/she is required to possess. To hold otherwise would make this law meaningless; a person desiring to operate a casino without being licensed to do so could use the simple expedient of concealing his/her real influence from the Nevada authorities.[1]

Goldfarb next argues that by interpreting the Nevada statutes referred to in the indictment as I did, I "went far beyond the allegations of the indictment to sustain the validity of the government's charge." (Goldfarb brief at p. 2) It is Goldfarb's argument that even if my interpretation of Nevada law is correct and the conduct claimed *is* criminal, the nature and dimensions of such a crime are so different from what is described in the indictment that he and the other Defendants were significantly disadvantaged thereby.

It appears Goldfarb alludes to principles of variance and amendment. The two concepts are closely related. Variance refers to the failure of the government's proofs to conform to the indictment. A variance is not fatal to the prosecution unless the defendant could not reasonably have anticipated from the indictment what evidence would be presented at trial or unless the indictment is so vague as not to bar subsequent prosecution on the same offense. *United States v Knuckles,* 581 F 2d 305, 309-311, (2nd Cir), *cert. denied* 99 S Ct 581 (1978); *United States v Fruehauf Corp.,* 577 F 2d 1038, 1056 (6th Cir), *cert. denied* 99 S Ct

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[1] Note here the distinction I make between the illegal conduct alleged against Goldfarb—continued functioning as a *de facto* casino officer after being denied a license to do so [Tr. 3982-3985]—and the illegal conduct alleged against Tamer—causing to be concealed or aiding in the concealment of his true role at the casino—in violation of Regulation 3.100.1 [Tr. 3988-3990] (*See* also Tr. 3973-3982)

349 (1978); *United States v Dunn*, 577 F 2d 119, 123 (10th Cir. 1978); *Watson v Jago*, 558 F 2d 330, 333-334 (6th Cir 1977); *United States v Maselli*, 534 F 2d 1197, 1201-1202 (6th Cir 1976). A variance is not ground for reversal unless the defendant's substantial rights are abridged. *United States v. Berger*, 295 U.S. 78, 82 (1934). In this case I find no prejudicial variance.

The apparent amendment claim needs more analysis, but it too is without merit. It is settled since *Ex Parte Bain*, 121 U.S. 1, 10 (1887) that neither the court nor the prosecutor may substantially change the indictment to "suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes . . ." This is in keeping with the principle that a court may not establish standards of conduct upon pain of imprisonment; such is the legislature's domain. An amendment to the indictment is *per se* reversible error. *United States v Crocker*, 568 F 2d 1049, 1059 (3rd Cir 1977), *United States v Fruehauf, supra*, at 1056. An amendment may be express or "constructive" (effective). *Id.* In determining whether there has been a constructive amendment inquiry should focus on whether any essential element of the crime was proved by facts different than those alleged. *Stirone v United States*, 361 U.S. 212 (1960). Thus, if the indictment alleges one sort of false testimony but the government is permitted to prove another sort, false testimony being necessary for conviction, an amendment has occurred. *United States v Crocker, supra.* Similarly, in a Hobbs Act case, if a grand jury alleges one sort of interstate nexus while proof and argument show another, an amendment has occurred. *Stirone v United States, supra. See United States v Prejean*, 494 F 2d 495, 497 (5th Cir 1974); *United States v Vesaas*, 586 F 2d 101, 103 (8th Cir 1978).

In this case, there were three elements the government was required to prove: (1) the use of an interstate facility;

(2) actual or attempted promotion, etc. of an unlawful activity; (3) specific intent. *United States v Prince,* 529 F 2d 1108, 1112 (6th Cir), *cert. denied* 429 U.S. 838 (1976) The proofs did not diverge from the course established by the requirement of these elements. The only apparent argument available to Goldfarb (and the other Defendants) is that the grand jury did not pass upon the exact shape of the illegal acts in Nevada, which it is their constitutional right to have done. I find this contention without merit. The grand jury needed to know enough of the Nevada gaming laws to make the indictment sufficient, which it did. My interpretation of Nevada gaming law presented Defendants with no new factual charges that they were required to meet, to use variance phraseology, nor did it allow either proof or argument of a new factual basis for any element of the crime, to use amendment terminology. Moreover, the allegation as to the Nevada offense was broad enough to include the specific crime I have already explained. It has often been held that one way to guard against a constructive amendment claim is to draft an indictment with generality, *United States v Crocker, supra,* at 1059, so long as it contains the necessary specificity.

Goldfarb's third point is that the conspiracy count in the indictment is duplicitous. In support he cites *United States v Gipson,* 553 F 2d 453 (5th Cir 1977).[2] His argument is that in both the indictment and the charge to the jury two distinct types of illegal conduct were described: *operation* of the casino by Goldfarb who was not, but should have been, licensed (accomplished by hiding his real role from the Nevada gaming authorities) and *concealment* from the authorities of Tamer's real role in the operation of the casino.

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[2] *See also United States v Gipson: Duplicity Denies Right to Unanimous Verdict,* 1978 Det. Coll. L. Rev. 319, cited by Defendant Tamer.

The conspiracy count charges an agreement among the defendants to conduct and operate the casino by persons who were not licensed, whose roles were concealed from the Nevada gaming authorities, in violation of §§ 463.160.1(a) and 463.335. Goldfarb contends that because I instructed the jury that a conviction could be based on their finding that there was an agreement to operate the Aladdin in violation of Nevada law either by concealing the role of Tamer or by the mechanism of Goldfarb's operation, or both, he was deprived of his right to a unanimous jury verdict. He argues it is possible that six of the jurors agreed on a Tamer centered conspiracy while the other six agreed on a Goldfarb centered conspiracy.

The Defendant's position is not persuasive. The first difference between this case and *Gipson* is that this case (at least insofar as duplicity is concerned) involves a conspiracy, rather than a substantive offense. The importance of this distinction is explained in *United States v Bolts*, 558 F 2d 316, 325-326 (5th Cir 1977), *cert. denied* 99 S Ct 262 (1978). The charge there was that the defendant had conspired to traffic in narcotics, in violation of several related drug laws. The indictment was challenged as duplicitous but the court disagreed. It said it was unnecessary for the jury to decide which specific statutory provision the defendant-appellant had agreed to violate, so long as he had joined an agreement to traffic in narcotics. In a footnote the court noted that the *Gipson* problem is answered when one notes that vicarious liability applies when a conspiracy is charged. Thus the individual defendant has conspired to violate all statutes which the conspiracy's members have agreed to violate, so long as he has joined the agreement pursuant to which they act.

Another important distinction between this case and *Gipson* is in *Gipson* the trial judge specifically told the jury (in response to a question) that their verdict *need not be unanimous*. They were told they could convict if some

of them found the defendant had possessed stolen property while other believed he had sold it. In this case, the jury was not so instructed. They were told that either a Tamer-centered or a Goldfarb-centered agreement could be found, or both, so long as they were unanimous as to each defendant's participation in the agreement.[3] [Tr. 3975-76, 3964 & 4000] This distinction was noted in *Bolts* and relied on *United States v. Pavloski*, 574 F 2d 933 (7th Cir 1978), an embezzling case. There the defendant argued the embezzling count was duplicitous because the jury could have convicted him if some members agreed on one specific instance of money taking while others agreed on another instance. The court observed that absent evidence of some impropriety, the presumption that a verdict is regular would foreclose the defendant's attack.

The final challenge to the indictment alleges its failure to spell out the exact nature of the Nevada offense. I earlier expressed some doubt as to whether a consummated state crime need be shown to establish a Travel Act violation. *United States v Goldfarb*, 464 F Supp 565, 574 (E.D. Mich 1978) However, since then I have proceeded on the assumption that there must be proof beyond a reasonable doubt of at least the existence of an applicable Nevada offense as an element of the § 1952 offense. This conclusion is based on the language of the statute, § 1952(b)(1). It speaks of "gambling . . . offenses in violation of the laws of the State in which they are committed. . . ."[4] It is also based

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[3] Of course, my ruling here is predicated upon the validity of both of the theories of illegality under Nevada law as embodied in the separate charges on the substantive counts as to Tamer and Goldfarb. If one theory was correct and one was incorrect, it would be possible that the jury convicted on the basis of a conspiracy to do non-illegal acts.

[4] I am of the opinion that unless there is some crime in Nevada for which the defendants could be prosecuted on the facts developed at trial, it would not be possible for the interstate travel to have been effected with the requisite intent under the statute.

on detailed study of the Act's legislative history and several cases that so hold. However, this is not to say that the Nevada offense need be spelled out in the indictment with any more specificity than it is. The indictment named the two specific statutes the violation of which was alleged to be criminal, as well as several regulations the content of which served to convey to the defendants the sort of illegal conduct in which they were charged to have engaged. In this regard, the indictment went far beyond what has been required in a number of Travel Act cases. *See United States v Rizzo,* 418 F 2d 71, 74 (7th Cir 1969), *cert. denied* 397 US 967 (1970). ("It is not necessary to allege the elements of the state substantive offense intended to be committed . . ."); *McIntosh v United States,* 385 F 2d 274, 277 (8th Cir 1967) (defendant claimed he could not have been prosecuted in Missouri because one element of state crime was missing); *United States v Aloi,* 449 F Supp 698, 711 (E.D. N.Y. 1977); *cf, United States v Gatto,* 299 F Supp 697, 700 (E.D. Pa. 1969), *cf., United States v Contris,* 592 F 2d 893, 896 (5th Cir 1979).

The fourth claim raised by Goldfarb is that I erred in allowing into evidence four "adoptive admissions" under F.R.E. 802(d)(2)(B). That rule provides in pertinent part that a statement "is not hearsay if . . . the statement is offered against a party and is . . . a statement of which he has manifested his adoption or belief of its truth . . ." According to S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual,* p. 460 (2nd ed 1977), "[a]n adoptive admission occurs when a party expressly or impliedly adopts or *acquiesces* in the statement of another." (emphasis added) The mere fact that a statement is made in the presence of the defendant is insufficient to warrant admitting the statement, *id.,* but when the circumstances surrounding it are such that it is more probable than not the defendant would have denied the statement were it untrue, the statement is an adoptive admission. *Id.,* at p. 480 *United States v King,* 560 F 2d 122, 134 (2nd Cir), *cert denied,* 434 U.S.

925 (1977); *United States v Williams*, 577 F 2d 188, 193-194 (2nd Cir), *cert. denied*, 99 S Ct 196 (1978).

I conclude that a reasonable person who was not an "owner" or someone's "boss" at the Aladdin would have so indicated in response to the statements made by "Martha" and Chandler. (See Goldfarb's brief at p. 3) Especially persuasive is Goldfarb's statement to "John" that it was "good work" to have told an associate to play at the Aladdin because a friend (presumably Goldfarb) had "a piece of the joint." As the government notes, *United States v Flecha*, 539 F 2d 874, 879 (2nd Cir 1976) and *United States v Yates*, 524 F 2d 1282, 1285 (D.C. Cir. 1975) are distinguishable in that in both cases the defendant against whom the statement was sought to be admitted was in custody and, presumably, acting under the belief that "silence is usually golden." *Flecha*, at 877.

Another claim is that the "Chodak call" (call No. 80) should not have been admitted because the incriminating portion of the call did not appear until well after the listening agents should have disconnected their headphones to minimize their interceptions.

Title 18 U.S.C. § 2518(5) directs that wire interceptions "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . ." The defendant urges me to adopt the rule set forth by Judge Kennedy in *United States v Giacalone*, 455 F Supp 26, 37 (E.D. Mi 1977), *aff'd.* 588 F 2d 1158 (6th Cir 1978): the government should cease to listen to a conversation once it is evident it does not pertain to the matter under investigation. If that was the rule, this call should not have been admitted. However, *Giacalone* is not a complete statement of the applicable law. It overlooks the point that a conversation can have more than one subject and can change course many times. A more complete statement of the test for minimization is found in *United States v Scott*, 436 U.S. 128, 140-142 (1978). *Scott* empha-

sizes that the reasonableness of a particular interception depends on several factors. The Chodak call was intercepted on the first day of monitoring, before the listening agents had any knowledge of the relationship between Goldfarb and Chodak. They likewise had little knowledge of the extent to which the conspiracy's aim was conducted over telephone wires. Finally, the call was intercepted before the agents had a chance to establish categories of nonpertinent calls that should not have been monitored. *Scott*, at 142; *cf., United States v Hyde*, 574 F 2d 856, 869-870, *reh. denied* 579 F 2d 643 (5th Cir 1978) (Minimization efforts judged by reasonableness standard, including scope of criminal enterprise under investigation, character of conversation and extent of judicial supervision)

Finally, Goldfarb asserts it was error to admit what came to be called the "Leonard evidence" under Rule 403 of the F.R.E. Under the government's theory of the case, Tamer and Goldfarb were interested in securing an expungement from Tamer's record of his 1939 criminal conviction so that if the Nevada gaming authorities became aware of the extent of Tamer's true role at the casino and required him to undergo licensing scruting, he would not have this conviction on his record. To this end, they attempted to enlist the aid of the Genesee County prosecutor in securing the expungement. Dfendants argue that the expungement was, at most, only tenuously related to the overall (alleged) aim of the conspiracy: the hidden operation of the Aladdin: They contend that because they were willing to stipulate that the purpose of the expungement was to secure Tamer's position, the government should not have been permitted to present highly inflammatory evidence of what appears to be public corruption; the incremental value of this evidence was very small, while the post-Watergate prejudice was great.

The proper standard to be applied with respect to Rule 403 is that evidence sought to be excluded should be given its maximum probative value and its *likely* prejudicial

value. Between these poles a balance should be struck. Saltzburg & Redden *supra*, 1979 Cum. Sup. at 41. If the balance is close, the evidence should be admitted. Saltzburg & Redden, *supra*, at 115.

The important feature of the Leonard evidence is the lengths it showed to which the defendants were willing to go to maintain their position in the Aladdin. Under the government's theory, this is highly probative of the fact that Tamer was more than the part-time entertainment director [Tr. 3597]. If he was only the show director, why should he be so (inordinately) concerned with such a position. Moreover, the fact that Tamer was worried that he might be re-called and asked to submit to licensure is circumstantial evidence his role exceeded what he had previously told the authorities when they decided he was not a "key-employee". Given that the government's case was built in substantial part upon circumstantial evidence, the Leonard evidence looms large, outweighing whatever projudice it may have generated and balancing principles require its admission.

**Defendant Monazym**

Defendant Monazym raises basically the same claim he has maintained all along: There is no evidence of his guilt. He does, however, raise one new claim pertaining to the asserted logical impossibility of the government's theory of the case in one respect.

The parties agree that the applicable standard is whether there was relevant evidence from which the jury could find beyond a reasonable doubt that the defendant was guilty of the conspiracy charged. In Monazym's case the question is whether there was evidence from which the jury could find that he agreed with Goldfarb to participate in a scheme to operate the Aladdin unlawfully, i.e., an agreement to participate with Goldfarb and Tamer in their hidden and/or unlicensed operation of the casino. This evidence must

be found in the single telephone call introduced against Monazym (call No. 54).

The government argued initially that the jury could infer from that conversation that Monazym had removed Goldfarb's name or initials from the Blotner, Guinyard and Slaton cards, and from that infer he joined the agreement. In the call Monazym said he "got rid of" something, all over which was Goldfarb's name. Coupling this with the fact that the people being discussed either had no credit cards or their cards did not contain Goldfarb's name while the names of many people for whom Goldfarb authorized credit *had* cards with Goldfarb's name affixed, the government says would support the inference that the thing Monazym "got rid of" was either the cards themselves or Goldfarb's name (*See* Tr. pp. 3032-3042). The logical impossibility of this argument is, in retrospect, clear. The Blotner, et al, cards could not have been what Monazym referred to as having "got rid of." The cards had not come into existence at the time of the conversation, whereas the "got rid of" statement is in the past tense, referring to a thing *already* done. Had the government predicated its case on that inference alone, the motion would be granted. However, the government did not in the final analysis proceed on that theory alone. What the government also argued was that the jury could find from the relationship between Goldfarb and Monazym that the call pertained to the operation of the casino, and from the fact that Monazym was speaking from the casino floor, that the things or documents referred to were casino records or documents. It could also find from the Blotner card and the absence of cards for Guinyard and Slaton that casino records or documents had at some time been destroyed or altered to keep Goldfarb's name from appearing thereon. From this it could be inferred that Monazym knew it was imperative that Goldfarb's name be kept off those documents or records; which would be strong evidence of his knowledge of both the existence and the purpose of the conspiracy. Thus, the connection between the absence of Goldfarb's name on the Blotner card (and

the absence of cards for Guinyard and Slaton) and the "I got rid of it" statement is not necessary to the government's theory. From this phone call the jury could reasonably infer Monazym joined the agreement and that he knew its purpose.

Monazym's argument could, however, be characterized in another way: Though the government had a viable theory, it chose to argue the more beguiling logical impossibility. This misleading argument, it could be contended, is grounds for a new trial. However, except for two somewhat ambiguout references to that theory at the bottom of pp. 3576 and 3903 in the transcript, the government did not rely heavily on the logically impossible contention. At most, it argued that the absence of Goldfarb's name on the Blotner card (and the absence of cards for Guinyard and Slaton) were merely evidence of a systematic, if futile, attempt by Monazym to keep Goldfarb's name off of casino records to which he had access.

**Defendant Abraham**

Defendant Abraham raises twenty-four (24) points in his motion, but argues only those numbered 8 and 9. Accordingly, only they are treated here.*

Abraham first asserts he was substantially prejudiced when I excluded the testimony of General Ralph Taylor concerning his managerial and organizational skills. This was relevant because it tended to show Abraham was only doing his job—managing the hotel—and did not have the specific intent necessary to violate the Travel Act, *United States v Prince, supra,* at 1112. *United States v Gebhart,* 441 F 2d 1261, 1263 (6th Cir), *cert. denied* 404 US 855 (1971); *cf., United States v Tyler,* 413 F Supp 1403, 1406 (M.D. Fla. 1976) (specific intent necessary part of factual

* Each of the remaining twenty-two (22) points was ruled on during the course of the trial.

basis for § 1952 guilty plea); Rule 404 (a)(1) F.R.E.; Rule 405(2) F.R.E. He additionally asserts that Taylor's testimony should have been admitted under Rules 702-705 of the F.R.E., in that Taylor was an "expert" on Abraham's abilities, and had the jury known this, it would have found it unlikely that one with such skills would have acted with the specific intent to violate the law. Finally, Abraham contends that by questioning Taylor with respect to the differences between the military and civilian life, to show there is no similarity between military and civilian skills, the government opened the door on redirect examination of Taylor on this issue to show that there are similarities. (Defendant's brief at p. 9)

As to Abraham's first point, I hew to my original position. Abraham's character was, of course, in a general sense "in issue" at least in the sense described in the Advisory Committee's Note to Rule 404(a). However, I do not believe it was "in issue" in the strict sense. Advisory Committee's Note to Rule 405. Therefore, I do not believe Rule 405(b) proof of specific instances of conduct (i.e., Abraham's efficient performance in the military) should have been introduced. In support of this proposition, *see United States v Jackson*, 588 F 2d 1048, 1055 (5th Cir 1979) where evidence of the defendant's truthfulness was excluded on the basis that a prosecution for heroin possession did not put his truthfulness "in issue." Likewise, Abraham's effectiveness as a manager was not in issue here. Ineffective management was not charged nor was proof thereof adduced. As to Abraham's contention that a good manager is, by definition, not an illegal one, I think that claim fails under Rule 403. As stated in the Advisory Committee's Note to Rule 405, "[T]he express allowance of inquiry into specific instances of conduct . . . as part of a case in chief when character is actually in issue in subdivision (b) contemplates that testimony of specific instances is not generally permissible on the direct examination of an ordinary witness as to character."

Concerning the contention that Taylor's credibility would have been enhanced if the jury knew the basis for his opinion of Abraham (brief at p. 5), this appears to be less an effort to buttress Taylor than an attempt to bring in through the back door evidence of Abraham's character. Taylor's truthfulness was not in issue. Moreover, the specific acts with which Abraham sought to reinforce Taylor's testimony would not have reinforced it in any material respect.

Abraham's third argument is that the government tried to show that military skills would not transfer into civilian life, and thus the door was opened to show the opposite. An examination of the trial transcript reveals some of what Abraham sought to introduce came in on the government's cross-examination. *See* Tr. pp. 3211-3212. The exclusion of anything more was not so prejudicial as to require a new trial.

Abraham's second major argument is that the prosecutor's question of Witness Lovell as to whether he knew or had heard that "in order for a shop or store to do business with the Aladdin . . . that payments were made personally . . . to Abraham, not the corporation, in exchange for getting that space?" was unduly prejudicial. Lowell replied he neither knew nor had he heard of such a practice or occurrence.

As Abraham has presented the issue, it might appear the question was improper, but upon scrutiny it clearly was not. [Tr. 3287-3328] Abraham cites two cases in support of his arguments. The first is *Gross v United States,* 394 F 2d 216 (8th Cir 1968). Without detailing the facts, that case is clearly distinguishable in important respects. There the court gave no cautionary instructions on the prejudicial questions either at the time or in its charge to the jury. In this case a thorough cautionary instruction preceded the question and was included in the final charge. In *Gross,* questions were put to two rather than only one witness, and

both witnesses were the subject of a series of questions, not one as here. Finally, the court made no inquiry as to the factual basis for the *Gross* questions. In this case, I made a thorough inquiry both on and off the record as to the government's factual basis for the question, and determined it had a basis before permitting the question. The fact that the line of questioning eventually backfired on the government does not in any way suggest bad faith. The case of *United States v Duke,* 492 F 2d 693 (5th Cir 1974) is distinguishable on similar grounds, most of which are set forth in the government's memorandum.

To conclude, no trial is perfect. In view of what finally occurred as to this matter, I would have preferred that the question not have been asked. But this is not the test. I find the spirit of *Michelson v United States,* 335 U.S. 469 (1948) has been observed, and that the prejudice, if any, was dissipated in Abraham's favor.

**Defendant Tamer**

Defendant Tamer brings separate motions for a judgment of acquittal under Rule 29(b), arrest of judgment under Rule 14 and for a new trial under Rule 33.

*New Trial/Arrest of Judgment*

Tamer's first contention is a recurring theme. Even if he did and intended all that was alleged and proved, there exists no state *criminal* prohibition. Thus, though a Travel Act prosecution need not include conviction on the underlying state crime, it must be established that the Defendant's conduct, if proved, was criminal, else travel across state lines with the intent to do or aid in the doing of the conduct alleged would not be travel with the intent to "promote", etc. an activity comprising a state offense. Thus, an element of the Travel Act would be unfulfilled, and the conspiracy would be to perform acts that are not illegal.

Crucial to Tamer's argument is the conclusion that the failure to disclose his real interest was not criminal but, rather, a violation of a regulatory prohibition only.[5] Tamer argues that unless a criminal statute expressly makes the violation of a regulation criminal, a regulatory violation is not subject to criminal sanctions. This point was developed more fully in pages 1-8 of Motion No. 14 (the "Logan Motion" as it was referred to during most of the proceedings). It is based on a widely quoted passage from Justice Frankfurter's dissent in *United States v Singer*, 323 U.S. 338, 350-1 (1954):

> . . . For more than half a century, ever since *United States v Eaton*, 144 U.S. 677, it has been the settled principle of federal criminal law that a provision merely punishing a violation of a 'law' does not cover violations of rules or regulations made in conformity with that law . . . The principle is that a crime is defined by Congress not by an executive agency.

The rule which emerges from this and other cases cited by Tamer is that unless the language making violation of a statute criminal expressly covers violations of regulations as well, violations of a regulation alone is not criminal. *See Williamson v United States*, 207 U.S. 425, 435-62 (1907); *United States v Grimaud*, 220 U.S. 506 (1910); *United States v George*, 228 U.S. 14, 20-22 (1913); *United States v Brewery*, 251 U.S. 210, 219-220 (1920); *Viereck v United States*, 318 U.S. 236, 2 (1943); *United States v Howard*,

---

[5] Note that Tamer was acquitted on the substantive charge. Thus, his attack on the verdict is directed to one of the two prongs of the conspiracy count. It is, in essence, an argument that since one of the objectives (or means) of the conspiracy was not a violation of Nevada law, the jury could have convicted him by finding he conspired to do something that is not illegal in Nevada. Defendant Goldfarb attacked the other prong of the conspiracy county by implication when he challenged the substantive count against him.

352 U.S. 212 (1957); *United States v Laub*, 385 U.S. 475 (1967). Tamer argues that since the concealment (or affirmative nondisclosure) he is alleged to have engaged in violated at most a regulation (he claims no statute requires disclosure), he has not engaged in any criminal conduct in Nevada and thus could not have conspired to travel in interstate commerce with the intent to promote, etc., any Nevada crime. Tamer claims my definition for the jury of an offense illegal in Nevada violated the principle set forth in the above cases. [Tr. 3988]

I find this case is distinguishable from those in the *Singer* line for two reasons. First, § 463.150.1 *requires* the Gaming Commission to promulgate regulations to ensure that the State of Nevada possesses full knowledge of those exerting significant control over the gaming industry. Because these regulations are required and are essential to the effectuation of the State's regulatory scheme, they must have the same force and effect as law. *United States v Nardello*, 393 U.S. 296 (1969); *United States v Goldfarb*, 464 F Supp 565, 571-572 (E.D. Mich. 1979). Second, to allow significant influence and control in the gaming industry to escape prosecution would leave a gap in the effect of the statutory network. That is, it would allow the unscrupulous to circumvent the entire scheme, escaping regulation by concealing their true interests. Such individuals would avoid being "required to be licensed" both by eschewing formal corporate title or indicia of ownership (N.R.S. § 463.530) and by avoiding ever being called forth for "key-employee" licensing because their true roles, which might cause the state to require licensure, would never be disclosed. To adopt the reading of the statutes urged by the Defendant would be the antithesis of the common sense reading urged by *United States v Polizzi*, 500 F 2d 856, 871-874 (9th Cir 1974) *cert. denied*, 419 U.S. 1120 (1974). *See also United States v Bernstein*, 533 F 2d 775, 797 (2nd Cir 1977) (compare to dissent of Graafieland, J., at 802-3).

Tamer also argues that there is no proof either that he knew Goldfarb was acting without a required license or that the Aladdin had not properly informed the authorities of his role, in violation of a gaming regulation. Thus, he argues he was without intent to violate the law because he did not know it was being violated. The evidence developed showed a close relationship between Goldfarb and Tamer, especially with respect to their participation in the affairs of the Aladdin. The evidence showed Tamer played a key role in the management and control of the Aladdin, both alone and in conjunction with Goldfarb. From this evidence, the jury could reasonably conclude both that Tamer knew of Goldfarb's precarious position and that the Aladdin had not divulged his name to the authorities as required by statutorily imposed regulation 3.100 [Tr. 3975].

Finally, Tamer contends that there is no evidence of an agreement between Goldfarb and Tamer. Suffice it to say that the circumstances, timing, tenor and content of the numerous conversations the two men had belie this assertion.

**Motion for New Trial**

Tamer's first and third issues relate to the Leonard evidence. He claims the jury was incessantly and repeatedly advised of his 1939 conviction, and that because he offered the affidavit given to the Genesee County Court as a stipulation in this trial, evidence as to his conduct towards Leonard should have been excluded. I do not agree.[6]

What is involved here is a weighing of the probative force of the Leonard evidence against its potential to influence or prejudice the jury. This evidence had fairly high probative value by showing how eager the defendants were to secure an expungement; it showed the size of the interest

---

[6] Tamer's argument is set forth more fully in his Motion in Limine to Exclude Evidence, filed on January 16, 1979. See especially p. 10.

in the casino that was at stake. This was strong circumstantial evidence of the existence of a far greater role for Tamer than disclosed to the Nevada authorities. The prejudice, on the other hand, was not as great. Care was taken to excise as much of the inflammatory material as was consistent with the presentation of the government's case. The fact that Tamer offered to stipulate to part of the evidence is not dispositive. As Judge Weinstein has said:

> . . . admission of prejudicial evidence may be proper in some instances even though the party against whom it is offered would have been willing to stipulate to the proposition for which it is offered, for the stipulation may not provide the jury with a basis for evaluating probative force. 1 J. Weinstein, *Weinstein's Evidence*, § 403[03] at pp. 403-22.

*See United States v Kompinski*, 373 F 2d 429 (2nd Cir 1967); *United States v Ravich*, 421 F 2d 1196 (2nd Cir 1970).

Tamer also claims he was deprived of his right to cross-examine Vincent Piersante, an organized crime official of the State of Michigan, because to cross-examine him would have been to open the door on re-direct to highly prejudicial evidence. The decision not to cross-examine was a tactical one. Had unduly prejudicial testimony been sought upon re-direct examination, the proper course would have been a Rule 403 motion to have it excluded.

As to the challenge to the Zenith Corporation search, my reason for upholding it is set forth fully on the record at pp. 822-3 of the Trial Transcript.

His next challenge is that the conspiracy charge is duplicitous. I have already discussed this matter fully in connection with Goldfarb's motion. I add only that unlike *Gipson*, where the court found the Dyer Act describes two separate sorts of crimes—the disposition and housing of stolen property—the Travel Act contains only one crime.

It proscribes the use of interstate facilities with only one intent: to promote, establish, carry on, etc. an illegal activity. The list of verbs contained in the statute does not fall into two distinct classes as they do in the Dyer Act.

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-5255, 79-5317/18/19/20

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

CHARLES GOLDFARB (79-5255),
EDWARD MONAZYN (79-5317),
JAMES ABRAHAM (79-5318),
ALADDIN HOTEL CORPORATION (79-5319),
JAMES TAMER (79-5320),
*Defendants-Appellants.*

Before: WEICK, LIVELY and BROWN, Circuit Judges.

**Judgment**

Filed March 5, 1981

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
*Clerk.*

**APPENDIX G**

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CHARLES GOLDFARB, JAMES TAMER, JAMES ABRAHAM, EDWARD MONAZYN, and the ALADDIN HOTEL CORPORATION, *Defendants-Appellants*

**Order**

Filed April 1, 1981

Before WEICK, LIVELY and BROWN, Circuit Judges.

Upon consideration of the petitions for rehearing in which all of the appellants joined and also the separate motion for rehearing filed by Appellant Aladdin Hotel Corporation, we are of the opinion that the issues in these appeals were adequately treated in our signed opinion and that said petition for rehearing and motion for rehearing lack merit.

It is therefore ordered that the petition for rehearing and and the separate motion for rehearing be denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
*Clerk.*

## APPENDIX H

The federal conspiracy law (18 U.S.C. § 371) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Travel Act (18 U.S.C. § 1952) provides in pertinent part that:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> • • •
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States, . . .

The Nevada Revised Statutes provide:

§ 463.150.1:

> The commission is empowered and shall, from time to time, adopt, amend or repeal such regulations, consistent with the policy, objects and purposes of this chapter as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this chapter.

§ 463.160(1)(a):

> License required.
>
> 1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:
>
> (a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool;
>
> • • •
>
> without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

§ 463.335 in pertinent part:

> Gaming employees required to hold work permits; hearings and review; confidential records; expiration of work permits.
>
> 1. As used in this section:
>
> (a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:
>
> (1) Boxmen;

(2) Cashiers;

(3) Dealers;

(4) Floormen;

(5) Hosts or other persons empowered to extend credit or complimentary services;

(6) Keno runners;

(7) Keno writers;

(8) Machine mechanics;

(9) Security personnel;

(10) Shift or pit bosses;

(11) Shills; and

(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages. . . .

§ 463.360:

The violation of any of the provisions of this chapter, the penalty for which is not herein specifically fixed, is a gross misdemeanor.

The Nevada Gaming Regulations provide in pertinent part:

Regulation 3:100:

Employee report.

1. Annually, on or before the 15th of July, each nonrestricted licensee, as defined in Reg. 4.030.1(b), shall submit an employee report to the board on a form to be furnished by the board. The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming

operations or physical security activities of such non-restricted licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:

. . .

(b) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed:

. . .

(d) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno or bingo games, slot machines, race or sports books, pari-mutuel operations, or any persons having authority to supervise or direct such persons;

. . .

(f) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;

(g) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance, review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to Reg. 6;

. . .

(i) All individuals who individually or as a part of a group formulate management policy.

. . .

3. Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar

year shall be reported to the board in writing no less than 10 days after the end of the calendar quarter during which the change, addition, or deletion occurred.

**Regulation 3.110:**

Key employee.

1. Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee or who is listed or should be listed in the annual report required by Reg. 3.100 is a key employee.

2. Whenever it is the judgment of at least 3 members of the commission that the public interest and the policies set forth in Nevada Revised Statutes Chapter 463, the Nevada Gaming Control Act, will be served by requiring any key employee to be licensed, the commission shall serve notice of such determination upon the licensee. The commission shall not be restricted by the title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Nevada Gaming Control Act include but are not limited to the following:

(a) The key employee is new to the industry, the particular gaming establishment, the position, or the level of influence or responsibility which he has and the board or commission has little or outdated information concerning his character, background, reputation, or associations, or

(b) Information has been received by the board or commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.

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No. 80-1979

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JAMES TAMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER

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JAMES TAMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 22.6 of the Rules of this Court, petitioner Tamer submits this Supplemental Brief to call the Court's attention to a recent decision of the District of Columbia Court of Appeals relating to the first question presented in our Petition — whether a defendant is entitled, under the Sixth Amendment, to a specific unanimity instruction when he is charged in one count with two or more separate offenses.

In *Hawkins v. United States,* ___ A.2d ___ (D.C.C.A. No. 80-1032, Aug. 13, 1981), the District of Columbia Court of Appeals ruled that in a case involving multiple charges against a defendant, "[w]here one charge encompasses two separate incidents, the judge must instruct the jury that if a guilty verdict is returned the jurors must be unanimous as to which incident or incidents they find the defendant guilty." Relying upon *United States v. Gipson,* 553 F.2d 453 (5th Cir. 1977), the court recognized the "constitutional magnitude" of the

right to such an instruction and reversed the defendant's conviction on a charge involving alternative grounds of culpability, holding that despite the defendant's failure to object, the lack of a specific unanimity instruction constituted plain error.

As *Hawkins* and the other decisions cited in our Petition demonstrate, this case thus presents a recurring issue of considerable importance upon which the appellate courts are divided. If the Court denies the request for summary reversal set forth in petitioner's Reply Brief, this Sixth Amendment question warrants review.

Respectfully submitted,

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Nos. 80-1979, 80-1981, 80-1983, and 80-2024

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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JAMES TAMER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

JAMES ABRAHAM, PETITIONER

*v.*

UNITED STATES OF AMERICA

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CHARLES GOLDFARB, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

ALADDIN HOTEL CORP., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether the instructions permitted the jury to convict petitioners of Travel Act offenses solely on the basis of state gaming commission regulations (Nos. 80-1979 and 80-1983).

2. Whether the instructions presented a theory of illegality not charged in the indictment (No. 80-1983).

3. Whether the instructions permitted conviction on a less than unanimous verdict (Nos. 80-1979 and 80-1983).

4. Whether under the facts of this case, the court abused its discretion in permitting cross-examination of a defense character witness on a specific act of misconduct by petitioner Abraham (No. 79-1981).

5. Whether a corporation may be convicted of conspiring with its agents to violate the Travel Act (No. 80-2024).

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# In the Supreme Court of the United States

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 643 F.2d 422. The opinion of the district court issued on January 2, 1979 (Pet. App. 26a-42a) is reported at 464 F.Supp. 565. Other opinions of the district court (Pet. App. 43a-76a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on March 5, 1981 (Pet. App. 77a). Petitions for rehearing were denied on April 1, 1981 (Pet. App. 78a). The petition in No. 80-1979 was filed on May 23, 1981; the petitions in Nos. 80-1981 and 80-1983 were filed on May 26, 1981; the petition in No. 80-2024 was filed on May 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a two-and-one-half month jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (the Travel Act), in violation of 18 U.S.C. 371 (Count IV). Petitioners Goldfarb and Abraham were additionally convicted on one count each of a substantive Travel Act violation (Counts I and III).[2] Abraham was sentenced to con-

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[1] "Pet. App." refers to the appendix to the petition in No. 80-1979. "J.A." refers to the joint appendix filed in the court of appeals.

[2] Petitioner Tamer was acquitted of a substantive Travel Act charge (Count II). Co-defendant Edward Monazym was convicted of conspiracy and sentenced to three years' probation and a $5,000 fine.

current terms of three years' imprisonment on both counts, all but 90 days of which was suspended in favor of two years' probation and a total fine of $5,000. Goldfarb was sentenced to concurrent terms of three years' imprisonment and a total fine of $20,000. Tamer was sentenced to three years' imprisonment and a $10,000 fine. The Aladdin Hotel Corporation was fined $10,000. The court of appeals affirmed (Pet. App. 1a-25a).

The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals and the district court's opinion denying post-trial motions. Briefly, it showed that in 1971 petitioner Goldfarb and other investors purchased the Aladdin Hotel in Las Vegas, Nevada. Goldfarb then applied to the State Gaming Control Board/Nevada Gaming Commission for a license as a stockholder-officer of the Aladdin Hotel Corporation, which was formed after the acquisition. The Nevada Gaming Commission rejected Goldfarb's application because of his " 'unsuitable background and unsuitable associations' " (Pet. App. 4a). Although Goldfarb thereafter divested himself of his financial interest in the Aladdin Hotel, he continued to maintain a substantial role in both the ownership and operation of the gaming activities (*id.* at 5a). In intercepted telephone conversations, petitioner Abraham, who was the Executive Vice-President and General Manager of the Aladdin, discussed management operations with Goldfarb, in a manner indicating that he recognized Goldfarb's directive authority (*id.* at 5a-6a; J.A. 497A-498H). Goldfarb had a new license application pending in connection with an option to purchase the stock of another Aladdin shareholder, but the pendency of that application did

not authorize his participation in the management of the Aladdin's gaming operations (79-1983 Pet. 2, 8).

There was also evidence indicating that petitioner Tamer performed a significant management function in the casino operation while ostensibly working only as the Hotel's "Entertainment Director." Nevada law bars any individual with a prior criminal record from occupying a "key position" in the operation of casinos. Tamer had a prior conviction for bank robbery. Because Tamer's true position was concealed by his title, his unfitness for that role escaped the scrutiny of the Nevada gaming authorities. Petitioner Tamer was, however, acquitted of the substantive Travel Act offense with which he was charged (Pet. App. 5a, 10a, 66a, 74a-75a).

## ARGUMENT

1. Petitioners Goldfarb and Tamer contend (80-1979 Pet. 18-25; 80-1983 Pet. 16-23) that the jury instructions improperly permitted convictions on the Travel Act conspiracy count if the jury found only that they violated a nonpenal state regulation requiring disclosure of the identities of employees directly or indirectly involved in the conduct of gaming operations. Petitioner Goldfarb makes the same argument (80-1983 Pet. 21) with respect to his conviction on the substantive Travel Act count. The contention is without merit because the regulation referred to is incorporated into Nevada statutes, the violation of which is a penal offense.

The state gaming statutes charged as a predicate for the Travel Act offenses make it "unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others," to "operate, carry on, [or] conduct"

gaming operations "without having first procured, and thereafter *maintain*[*ed*] in [full force and] effect, *all* [*necessary*] federal, state, county and municipal *gaming licenses as required by statute or ordinance* * * *." Nev. Rev. Stat. § 463.160.1(a) (1979) (emphasis added). An additional state statutory requirement thereby imposed on those required to be licensed is an obligation to "maintain on file with the commission a current report" that sets forth "such information as may be required by the regulations" of the Nevada Gaming Commission. Nev. Rev. Stat. § 463.290 (1979).[3] Violations of Section 463.160.1 are punishable under state law by imprisonment for a term of one to twenty years, a fine of up to $50,000, or both. Nev. Rev. Stat. § 463.360.3 (1979). Any provision of the gaming statutes for which the penalty is not specifically fixed is punishable as a gross misdemeanor. Nev. Rev. Stat. § 463.360.5 (1979).

Commission regulations require licensees to submit annual reports identifying "every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations" of the licensee, including "individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed." Nev. Gaming Reg. 3:100 (Pet. App. 81a-82a). The failure of the Aladdin to submit such information about Goldfarb therefore violated both Nev. Rev. Stat. § 463.290 and § 463.160.1(a) (1979).

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[3] In addition, as an applicant for a stockholder's license, Goldfarb was obligated to make full disclosure to state authorities of all information that is necessary to carry out the policies of the State "relating to licensing and control of the gaming industry." Nev. Rev. Stat. § 463.339 (1979).

Moreover, Goldfarb, through his unlicensed involvement in the administration of the Aladdin's gaming operations, in violation of Nev. Rev. Stat. § 463.160.1(a) and § 463.335 (1979), his concealment of that involvement, and his use of interstate facilities, violated the Travel Act because he used interstate facilities to promote an unlawful activity, *i.e.*, a business enterprise involving gambling in violation of state law. 18 U.S.C. 1952(a)(3), (b)(1). All who conspired with Goldfarb in this activity were properly convicted under 18 U.S.C. 371 of a conspiracy to violate the Travel Act.

In sum, although the trial court probably erred in suggesting in its instructions on the conspiracy count (J.A. 1205) that all regulations of the Nevada Gaming Commission have the force of penal law, it was correct insofar as it suggested that the Nevada statutes require that the Commission's reporting requirements be satisfied. The error in the instructions was accordingly immaterial, because the prosecution rested on only those regulations that require the reporting of specified information.[4]

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[4] Any error in the trial court's instructions with respect to violation of a disclosure requirement is harmless for the additional reason that, in instructing the jury on the substantive count against petitioner Goldfarb, the court expressly required the jury to find (J.A. 1217-1218) either that Goldfarb. had "willfully engaged in the ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel" without the required license (*i.e.*, had violated Nev. Rev. Stat. § 463.160.1(a) (1979)) or that he had willfully concealed such actions from the Nevada Gaming Commission, or that he had done both. Under this instruction, the jury would be required to find the willful conduct of gaming operations without proper licensing, even if it made its finding under the concealment branch of the trial court's instruction.

2. Petitioner Goldfarb contends (80-1983 Pet. 6-16) that the trial court's instructions amounted to a constructive amendment of the indictment, in violation of the Fifth Amendment, by diverging from the theory of illegality underlying the indictment (although not presenting him with new factual allegations to contest). Specifically, he argues (Pet. 8-12) that neither the indictment, nor the prosecution in its responses to motions to dismiss the indictment,

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Thus, regardless of whether the concealment offense involved only a violation of nonpenal regulations, the jury's verdict necessarily represents a finding that Goldfarb violated Section 463.160.1 of the Nevada gaming statutes. (And because the trial court instructed the jury that it had to make one or both of those findings to convict Goldfarb on the substantive count, it is immaterial that the court also advised the jury (J.A. 1215) to "keep in mind" instructions on the conspiracy count in which the court had defined "unlawful activity.") The charge on the substantive count against petitioner Abraham emphasized that he was essentially accused of aiding and abetting Goldfarb's offense (J.A. 1227, 1229).

The charge on the substantive count against petitioner Tamer relied more heavily on the Commission's regulations (J.A. 1221-1223), but the jury acquitted Tamer on that count. Because the jury convicted on the substantive counts in which they were expressly required by the court to find a violation of Nev. Rev. Stat. § 463.160.1 and acquitted Tamer on the substantive count against him, one may logically deduce that it must have found a Travel Act conspiracy based on a violation of Nev. Rev. Stat. § 463.160.1 (1979). Hence, the conviction on the conspiracy count was properly upheld even if the instructions would also have permitted the jury to convict for a conspiracy to violate a regulation. Compare, *e.g.*, *United States* v. *Erickson*, 601 F.2d 296, 303 (7th Cir. 1979), and *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976), with *United States* v. *Head*, 641 F.2d 174, 178-179 (4th Cir. 1981), and *United States* v. *Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978).

had proceeded on a theory that a violation of the regulations alone was a sufficient predicate for a Travel Act violation, but that the trial court's instructions reflected such a theory. He also contends (Pet. 14-15) that the trial court, contrary to the indictment, allowed petitioner to be convicted for merely exercising "significant," but unreported, "control and influence" over gaming.

The arguments are not well taken. First, as explained above, the allegations in the indictment that petitioner Goldfarb used interstate facilities in the course of promoting the conduct of gaming operations in violation of Nev. Rev. Stat. § 463.160.1 (1979), by the terms of the statute, encompass violations of the Commission's regulations pertaining to disclosure. The trial court's instructions thus did not diverge in any significant way from the indictment. Furthermore, as we have also explained above (pages 6-7, note 4, *supra*), the trial court's instructions expressly required the jury to find that petitioner Goldfarb conducted gaming operations without proper licensing, in violation of Section 463.160.1, in order to convict him of the Travel Act offense.

Second, contrary to petitioner's contention (80-1983 Pet. 14), the trial court's instructions did not permit his conviction upon a jury finding that he had exercised control and influence to the same degree as might be true of any large bettor or person who refers friends to a casino. The trial court's instructions (J.A. 1215-1216) plainly indicated that the reporting requirements concerned persons who functioned as gaming employees or who had ownership interests and, as noted, they required a jury finding that Goldfarb engaged in the ownership, operation, conducting, or carrying on of gaming operations at the Alad-

din. Thus, the concept of significant control and influence over gaming was effectively limited in application to persons in positions of actual authority, as the proof showed Goldfarb to be.

3. Petitioners further contend (80-1979 Pet. 12-18; 80-1983 Pet. 23-26) that, by instructing the jury with respect to the conspiracy count (J.A. 1205-1208) that it could convict if it found either a conspiracy to promote the conduct of gaming operations by an unlicensed person or a conspiracy to conceal someone's exercise of control or influence over gaming operations, and by giving only a general unanimous verdict instruction, the trial court denied petitioners their right to a unanimous jury verdict. Petitioners' theory is that some jurors may have concluded that there was a conspiracy with respect only to the first object and others may have predicated their vote on a finding that petitioners conspired with respect only to the second object.

Petitioners rely chiefly on *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), in making this argument. But as the Fifth Circuit later explained in *United States* v. *Bolts*, 558 F.2d 316 (1977), "*Gipson* involved a situation where the court expressly sanctioned a non-unanimous verdict: the jurors were told that they could disagree as to what particular prohibited acts were committed, as long as each juror found that one of the acts had been done" (558 F.2d at 326 n.4; citation omitted). The trial court here advised the jurors that their verdict must be unanimous (J.A. 1232-1233). Their verdict should not be overturned because of the possibility that some jurors disobeyed or misunderstood that instruction. "It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that

they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States* v. *Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), cited in *United States* v. *Murray*, 618 F.2d 892, 898 (2d Cir. 1980).

In any event, because, as explained above (pages 6-7, note 4), it seems likely that the jury must have found a conspiracy to violate the licensing statute, Nev. Rev. Stat. § 463.160.1 (1979), this is not, as petitioner Tamer suggests (80-1979 Pet. 13), an appropriate case in which to resolve any disagreement that might exist among the circuits on the question of what instructions are necessary to ensure a unanimous verdict on a count charging a conspiracy with multiple objects.

4. Petitioner Abraham contends (80-1981 Pet. 13-18) that the trial court abused its discretion in denying a mistrial after the government cross-examined a defense character witness on a specific act of misconduct that Abraham was alleged to have committed.

In his defense Abraham presented several character witnesses, the last being one Carl E. Lovell, Jr., former City Attorney of Las Vegas. Although he had no law enforcement duties as City Attorney, Lovell testified that petitioner enjoyed a good reputation with Nevada's " 'law enforcement community' " (Pet. App. 23a). At a side bar conference during cross-examination of Lovell, the government sought permission to question Lovell as to whether he knew that petitioner had personally accepted payments from a corporation seeking to lease space within the Aladdin Hotel. In a lengthy mid-trial hearing on the propriety of that line of questioning, the govern-

ment proffered to the court a check for $1,000 and presented its evidence that the check constituted a bribe (J.A. 985-1026, 1035-1052). Finding a good faith basis for the question, the court permitted the government to ask it for the purpose of impeaching Lovell's character testimony; but it cautioned the jury beforehand that "these [upcoming] questions will be permitted for the sole and limited purpose of testing Mr. Lovell's knowledge of Mr. Abraham's reputation in the Las Vegas community during [*sic*] the Las Vegas business world and they are to be considered by you only for the purpose of testing the credibility of Mr. Lovell who has given character or reputation testimony about the defendant Abraham. You will consider it for no other purpose" (J.A. 1079). When asked, Lovell said he had not heard of such an incident (J.A. 1080).

The government then sought to introduce evidence of the $1,000 payment and petitioner's failure to declare the payment as income on his tax return. After another lengthy hearing and proffers by both sides (J.A. 1083-1142),[5] the court suggested that permitting this evidence as rebuttal to Lovell's character testimony and then additional surrebuttal evidence for petitioner would result in a "mini-trial within the trial for the jury on other acts" (J.A. 1140).

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[5] Petitioner mistakes the record in arguing (80-1981 Pet 8) that the only basis for the question was the mere existence of the check made payable to him. In fact, the person who wrote the check on behalf of the concessionaire testified that he paid petitioner to assure that if they had subsequent problems they could go to him for help (J.A. 1100). Moreover, the numerical sequence on the checks relating to the Aladdin lease and the check to petitioner suggested that the latter transaction might be linked to the former.

Accordingly, the court refused to permit the government to offer evidence of the $1,000 payment.[6] At that point the government moved to withdraw the question (J.A. 1142). The court agreed, and instructed the jury that the questions asked of Lovell concerning payments allegedly made to petitioner by persons seeking space at the Aladdin were withdrawn and that the jury should thus disregard the questions and answers (J.A. 1150). The court declined to instruct the jury in addition that the question had no basis in fact.

Petitioner does not challenge the traditional rule that permits cross-examination of a character witness by asking him if he has heard of prior instances of a defendant's misconduct that are inconsistent with the reputation testimony. *Michelson* v. *United States*, 335 U.S. 469 (1948). Rather, petitioner suggests that the court erred in allowing the question without a good-faith factual basis. The record belies that claim. The prosecutor proffered both the check itself, which was drawn at the same time and in sequence with rent checks payable to the Aladdin Hotel, and the testimony of the check's signer to the effect that the check was given in exchange for cooperation with the concessionaire. That proffer provided a sufficient factual basis for the question. *United States* v.

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[6] Thus, petitioner errs in characterizing the court's decision as a finding that the "charge of 'bribe[ry]' was without any basis in fact" (80-1981 Pet. 10). Rather, the court chose to exclude further evidence because two defense witnesses testified inconsistently with the writer of the check, and the court dclined to permit another credibility issue to be presented to the jury (J.A. 1140-1142).

*Bright*, 588 F.2d 504, 512 (5th Cir.), cert. denied, 440 U.S. 972 (1979).[7]

5. Petitioner Aladdin Hotel Corporation contends (80-2024 Pet. 6-8) that a corporation may not be convicted of a conspiracy with its own officers and agents who are acting on behalf of the corporation. The contention is unsound.

*Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), and *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599 (D.C. Cir. 1960), relied on by petitioner (80-2024 Pet. 7-8), do not mandate a contrary result. In those private lawsuits to enforce civil antitrust laws, the courts suggested that conspiracies in restraint of trade must extend beyond the limits of the corporation. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914. That is so because the antitrust laws are directed at the "joint action of two or more persons in combining their economic power and restricting competition." *Poller* v. *Columbia Broadcasting System, Inc.*, *supra*, 284 F.2d at 603. That analysis does not, however, necessarily apply to conspiracies to commit criminal offenses—such as the Travel Act offenses and underlying state offenses concerned here—out-

[7] Petitioner asserts (80-1981 Pet. 15-18) that decisions of the Fifth Circuit and the District of Columbia Circuit conflict with those of the Sixth Circuit with respect to the exercise of judicial discretion in permitting impeachment by reference to specific instances of misconduct. Even if the former circuits have a more stringent standard, however, this case does not present a proper vehicle for consideration of the alleged conflict. The court's actions here fully complied with the recommended procedures in the Fifth Circuit and District of Columbia Circuit.

side the antitrust area. There is nothing novel in charging a corporation, along with its officers or employees, of conspiring to commit a criminal offense (see, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 614-615 (1949); *Egan* v. *United States*, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943); *Mininsohn* v. *United States*, 101 F.2d 477, 478 (3d Cir. 1939)), and petitioner Aladdin has cited no authority or justification for applying the rule of the cases it cites in cases not involving violations of antitrust laws.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1979

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JAMES TAMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

1. The government has, in effect, confessed error with respect to petitioner Tamer. Although it convinced the court of appeals that the trial court's instructions regarding both a Tamer-centered conspiracy (concealment) and a Goldfarb-centered conspiracy (unlicensed operation) were correct,[1] the government now recognizes that the portion of the charge defining the Tamer-centered conspiracy was in error (Brief in Opp., at p. 6 & n.4).[2] The government has thus responded to the second question presented in our Petition by agreeing with us

[1] See, e.g., the government's Brief in the court of appeals (at pp. 73-75); and the opinion of the court of appeals (Pet. App. No. 80-1979, at pp. 15a, 20a).

[2] *Compare* the government's concession in this Court (Brief in Opp., at p. 6: "the trial court probably erred in suggesting in its instructions on the conspiracy count . . . that all regulations of the Nevada Gaming Commission have the force of penal law"), *with* its post-trial position in the district court "that a violation of the Regulations alone would predicate a Travel Act violation." (Pet. No. 80-1979, at p. 9).

that the trial court misconstrued the Travel Act when it converted a non-penal state regulation into "unlawful activity" within the meaning of the Act (18 U.S.C. §1952(b)).[3]

Since petitioner Tamer was convicted only on the conspiracy count and since there is no longer any dispute that the instructions improperly construed the Travel Act and permitted a guilty verdict for actions that Congress has not made criminal, Tamer's conviction must be reversed. The government, however, seeks to avoid this consequence of the trial court's error by arguing that although the instructions concerning the Tamer-centered conspiracy were improper, the instructions concerning the Goldfarb-centered conspiracy under the same count were correct and that "it seems likely that the jury must have found" this latter conspiracy rather than the Tamer-centered "conspiracy to violate a regulation."[4] The only basis for the government's notion of what "seems likely" is that the jury acquitted petitioner of the substantive count against him.[5]

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[3] See our Petition, at pp. 18-25. The trial court had reached this result on the basis that a federal judge applying the Travel Act must interpret state law from a federal viewpoint and therefore could find "unlawful activity" under state law even if the state legislature had not made the activity criminal (*id.* at 22-23).

As a result of this misinterpretation, the trial court instructed the jury that the illegal activity involved in the Tamer-centered conspiracy consisted of petitioner Tamer's "causing to be concealed or aiding in the concealment of his true role at the casino — in violation of Regulation 3.100.1," which is not a state criminal offense. (Pet. App. No. 80-1979, at p. 58a n.1; Pet. No. 80-1979, at pp. 6-8).

[4] Brief in Opp., at pp. 10, 7 n.4.

[5] *Id.* at p. 7 n.4.

The district court, however, indicated that it was impossible to say with any degree of certainty on what theory the jury's general verdict of guilt rested. In denying petitioner's post-trial motions, the district court ruled on the premise that its instructions on both conspiracies were correct, but cautioned that *"[i]f one theory was correct and one was incorrect, it would be possible that the jury convicted on the basis of a conspiracy to do non-illegal acts."* (Pet. App. No. 80-1979, at p. 82a n.3, emphasis added). The district court thus recognized what the government in this Court has apparently forgotten — namely, that "conspiracy and the completed substantive offense [are] separate crimes," *Ianelli* v. *United States,* 420 U.S. 770, 777 (1975), and that there is nothing inconsistent about a jury's convicting on conspiracy and acquitting on the substantive offense.[6] That is particularly true in this case since the substantive count on which Tamer was acquitted (Count 2) appeared on its face to charge unlicensed operation by Tamer while the erroneous conspiracy instructions concerned concealment.[7] Moreover, even aside from the faulty premise of its argument, the government can do no better than speculate about what "seems" to have been on the minds of the jurors.

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[6] In addition to *Ianelli* v. *United States, supra,* and the cases there cited, see e.g., United States v. Wylie, 625 F.2d 1371, 1381 (5th Cir. 1980), *cert. denied,* ___ U.S. ___ (1981) (101 S.Ct. 863). ("conviction on the substantive count will require the consummation of the crime, which, of course, is not essential for completing the crime of conspiracy"). To illustrate, the acquittal of a person on a charge of murder would not require that the conviction for conspiracy to murder be set aside.

[7] *Compare* Count 2 of the Indictment, at p. 45 of the Appendix in the court of appeals, *with* the court's conspiracy instructions, *id.* at 1205-1208. The court read Count 2 to the jury (*id.* at 1218-1220) and a recording of the instructions was sent to the jury (*id.* at 1234).

In these circumstances, the rule followed in *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957), and numerous other decisions of this Court is controlling: a verdict must be set aside when it "is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Accord, e.g., Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U.S. 287, 291-292 (1942); *Cramer* v. *United States*, 325 U.S. 1, 34 n.45 (1945); *Haupt* v. *United States*, 330 U.S. 631, 641 n.1 (1947); *Grunewald* v. *United States*, 353 U.S. 391, 415 (1957); *New York Times* v. *Sullivan*, 376 U.S. 254, 284 (1964); *Street* v. *New York*, 394 U.S. 576, 586 (1969); *Leary* v. *United States*, 395 U.S. 6, 31-32 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 569-571 (1970); *Sandstrom* v. *Montana*, 442 U.S. 510, 525-526 (1979).[8]

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[8] Rather than citing this Court's decisions on point, the government (Brief in Opp., at p. 7 n.4) relies on two court of appeals decisions that seem to hold that when an offense may be committed by multiple means, the validity of any one of the means will support the conviction. The circuits, however, are in conflict over this issue, with a majority following a contrary rule and requiring reversal if any one of the alleged means is invalid. See *United States* v. *Kavazanjian*, 623 F.2d 730, 739-740 (1st Cir. 1980); *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977); *United States* v. *Head*, 641 F.2d 174, 178-179 (4th Cir. 1981); *Van Liew* v. *United States*, 321 F.2d 664, 672 (5th Cir. 1963); and *United States* v. *Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978). *Compare United States* v. *Tanner*, 471 F.2d 128, 139-140 (7th Cir.), *cert denied*, 409 U.S. 949 (1972), *with United States* v. *Baranski*, 484 F.2d 556, 559-562 (7th Cir. 1973).

At all events, the decisions of this Court cited in the text are controlling here. In light of the district court's instruction, there is no dispute that two different conspiracies (or offenses) were charged in a single count, rather than one conspiracy that had multiple objects. See our Petition (No. 80-1979), at p. 12 n.11.

In sum, we believe, as does the government, that the district court gave improper instructions based on its misinterpretation of the Travel Act and permitted the jury to convict petitioner Tamer for activities that are not criminal. Since the court's error is plain, *Yates* and the other decisions of this Court cited above require that petitioner's conviction be set aside. In this situation, we therefore believe it is appropriate for the Court to grant the petition and summarily reverse the judgment below.[9]

2. Our Petition also raised the question whether a defendant in a federal criminal trial in which two separate offenses are charged in a single count is entitled, upon timely request, to a specific unanimity charge in order to protect his right to a unanimous verdict under the Sixth Amendment (Pet. No. 80-1979, at pp. 12-18). The government has responded to our arguments in this regard by suggesting that this is not an appropriate case to resolve the disagreement among the circuits on this issue because it appears — or "seems likely" — that the jury convicted on the basis of the Goldfarb-centered conspiracy rather than the Tamer-centered conspiracy (Brief in Opp., at p. 10).

We have already discussed why the government's statement about what the jury had in mind is nothing more than mere speculation. In any event, what seems likely to the government at this stage of the case does not

[9] We have joined in the certiorari petition filed by co-defendant Goldfarb (No. 80-1983) and therefore disagree with the government's contentions regarding the validity of the court's instructions on the Goldfarb-centered conspiracy. Because petitioner Tamer was convicted and sentenced only on the conspiracy count and because his conviction must be set aside in any event, there is no need for the Court to consider that issue with respect to him.

diminish the obvious importance of this issue (which the government does not contest) and does not in any manner alter the defendant's Sixth Amendment right to specific protection at trial in order to ensure that the jury acts unanimously. The government's reply that it must be "assumed" the jury so acted is unresponsive to our arguments regarding why a defendant's constitutional right to a unanimous verdict cannot be trusted to assumptions when the trial judge "has a powerful tool at his disposal to protect the constitutional" right of the defendant — "the jury instruction." *Carter* v. *Kentucky*, ___ U.S. ___ (1981) (101 S.Ct. 1112, 1120). See Pet. No. 80-1979, at pp. 16-18.

Although the government's confession of error on the conspiracy instructions is, we believe, dispositive and requires reversal of petitioner Tamer's conviction, if the Court does not deem it appropriate to dispose of the case on that ground the Sixth Amendment issue would remain and, for the reasons stated in our Petition, would clearly warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted. As discussed above, we believe this is an appropriate case for summary reversal of the judgment of the court of appeals affirming petitioner's conviction.

Respectfully submitted,

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